FEDERAL
ANTI-TRUST DECISIONS

CASES DECIDED IN UNITED STATES COURTS

ARISING UNDER, INVOLVING, OR GROWING
OUT OF THE ENFORCEMENT OF

THE FEDERAL ANTI-TRUST ACTS

(Act of July 2, 1890; 26 Stat., 209)
(Act of Aug. 27, 1894; 28 Stat., 570)
(Act of Feb. 12, 1913; 37 Stat., 667)
(Act of Oct. 15, 1914; 38 Stat., 730)

INCLUDING A FEW SOMEWHAT SIMILAR DECISIONS
NOT BASED UPON THOSE ACTS

1890-1917

COMPILED BY
JOHN L. LOTT
AND
ROGER SHALE
UNDER THE DIRECTION OF THE ATTORNEY GENERAL

VOL. 5

WASHINGTON
GOVERNMENT PRINTING OFFICE
1917

ADDITIONAL COPIES

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WASHINGTON, D. C.
AT
$1.00 PER COPY

CASES REPORTED IN THIS VOLUME.

(VOLUME 5.)

FEDERAL ANTI-TRUST DECISIONS.

VOL. 5.

1912-1914.

Syllabus.

UNITED STATES v. PATTERSON et al.[a]

(District Court, S. D. Ohio, W. D. June 26, 1912.)

[201 Fed. Rep., 697.]

MONOPOLIES (§ 10)—SHERMAN ANTI-TRUST ACT—CONSTITUTIONALITY.—The Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209, c. 647 [U. S. Comp. St., 1901, p. 3200]), making it a criminal offense to make any contract or engage in any combination or conspiracy in restraint of interstate trade or commerce, or to monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of such trade or commerce, is a valid criminal statute, sufficiently clear in itself to inform the accused of the nature and cause of the accusation againt him, and criminal prosecutions under it do not deprive the defendants of liberty or property without due process of law.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.]

MONOPOLIES (§ 31)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR VIOLATION.—If an indictment under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209, c. 647 [U. S. Comp. St., 1901, p. 3200]), charges acts on the part of defendants which are in fact and necessarily in restraint of interstate trade and commerce, or effect a monopoly of some part of such commerce, by wrongfully injuring or destroying the business of competitors, defendants are presumed to

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[a] For opinion of District Court on the patent question (205 Fed., 292), see *post*, page 45.

For opinion of the Circuit Court of Appeals reversing conviction (222 Fed., 599), see *post*, page 60.

Petition for writ of certiorari denied (238 U. S., 635), June 14, 1915.

[b] Syllabus copyrighted, 1913, by West Publishing Company.

Syllabus.

have intended such consequences, and to have known that their acts were in violation of the statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 31)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR VIOLATION.—An indictment under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209, c. 647 [U. S. Comp. St., 1901, p. 3200]), charging a number of defendants with a conspiracy in restraint of interstate trade and commerce, is sufficiently specific where it avers that defendants were the managing officers and agents of a corporation, who controlled the conduct of its business, and, while not naming particular instances specifically, describes the course of conduct and means used by the corporation, by which it compelled many competitors, some of whom are also named, to go out of business, or to sell their business to it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

CRIMINAL LAW (§ 1186)—RULES OF ADMINISTRATION—TECHNICAL DEFENSES.—At the present time the reasons which formerly impelled courts to resort to technicalities in criminal cases to avoid the infliction of unjustly severe penalties have ceased to exist, and the effort now on the part of the judges is to overlook technicalities so far as possible, and to administer the law from a broad viewpoint, looking to ultimate justice upon the merits.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219; Dec. Dig. § 1186.]

MONOPOLIES (§ 31)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR VIOLATION.—An indictment for conspiracy in restraint of interstate commerce in violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat., 209, c. 647 [U. S. Comp. St., 1901, p. 3200]), charges an offense, where a general charge is made of restraint of trade in a particular article, pur[698]suant to a conspiracy for the purpose, and specific facts are alleged which, if true, show that defendants have restrained a part of that trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 12)—SHERMAN ANTI-TRUST ACT—CONSPIRACY IN RESTRAINT OF TRADE.—If the purpose of a conspiracy is to restrain interstate trade, within the meaning of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), the degree of restraint effected thereby is immaterial to the offense.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 31)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR CONSPIRACY IN RESTRAINT OF TRADE.—In an indictment under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), for conspiracy in restraint of interstate trade and commerce, it is not necessary to allege an overt act.

Statement of the Case.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 31)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR "MONOPOLY."—An indictment for monopolizing a part of interstate trade and commerce in violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), sufficiently charges such monopoly where it alleges that pursuant to a conspiracy therefor defendants monopolized a part of the trade in a single article entering into such commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.

For other definitions, see Words and Phrases, vol. 5, pp. 4570–4574.]

MONOPOLIES (§ 31)—SHERMAN ANTI-TRUST ACT—MONOPOLY OF INTERSTATE COMMERCE.—Where defendants acquired a monopoly in a part of interstate commerce through a conspiracy for the purpose, the continuance of such monopoly after the conspiracy has accomplished its purpose and ceased to exist is in itself an offense under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647, § 2 [U. S. Comp. St. 1901, p. 3200]), and the conspirators are criminally liable therefor, although the business is conducted by a corporation which is controlled by them.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

INDICTMENT AND INFORMATION (§ 129)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR VIOLATION—DUPLICITY.—In an indictment under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), counts for conspiracy in restraint of interstate commerce, for conspiracy to monopolize a part of such commerce, and for monopolizing a part of such commerce may be joined.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414–418; Dec. Dig. § 129.]

Criminal prosecution by the United States against John H. Patterson and 29 others. On demurrer to indictment. Overruled.

[699] The following true bill of indictment against the several defendants therein named was presented February 22, 1912:

FIRST COUNT.

SOUTHERN DISTRICT OF OHIO, *Western Division—sct.*

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Western Division of the Southern District of Ohio at the February term thereof in the year nineteen hundred and twelve, and inquiring for that division and district, upon their oath present, that throughout the

Statement of the Case.

twenty years last past, inventors and manufacturers have been busy inventing, producing, and putting upon the market divers record-keeping and cash-receptacle devices, usually called cash registers, each consisting generally of a box, principally of metal, but partly of wood, glass, or other materials, containing a drawer or recess for the holding of coins and paper money, and a mechanism, manipulated by outside keys or similar means, for the use of employés in registering, for the information of the proprietor, upon a concealed and locked record, the sales made by employés of the business concern making use of the device, and at the same time visibly indicating the amount of each sale or the character of each transaction; the recording or registering devices being so connected with the lock of the money-drawer that when any of said devices is operated the money-drawer is unlocked and opened, so that money can be placed therein and change extracted therefrom; said money-drawer being automatically locked upon being closed, and the interior mechanism of said registering device being protected by a lock, the key of which is retained by the proprietor, from being interfered with by unauthorized persons; numerous patents having, during said twenty years, been issued to inventors, some basic and some for improvements; most of the former and many of the latter having expired long before the three-year period of time in this indictment hereafter mentioned; and the number of such patents being so great as to prevent the setting forth in this indictment of detailed descriptions of the same, or of the various inventions covered by them, even if such descriptions were known to said grand jurors:

That such cash registers have been found so useful and the demand for them has been so great that, during said twenty years, many concerns have been engaged, in the manner and under the circumstances in this indictment hereafter set forth and in competition with each other, except as hereinafter shown, in the manufacture and sale, directly and indirectly under letters patent, and otherwise, of such cash registers; and that a list of the names of such of said concerns as are known to said grand jurors, showing their respective places of manufacture, so far as known to said grand jurors, is as follows, to wit: The National Cash Register Company, a corporation, Dayton, Ohio. [Then follow names of 32 other companies.]

That of the total amount of manufacturing of such cash registers done by all of said concerns during said twenty years, said the National Cash Register Company has done from approximately eighty per cent early in said period to approximately ninety-five per cent at the latter end thereof.

That said concerns, during said twenty years, have also respectively sold the greater portion of the cash registers so manufactured by them, some to users of and some to dealers in such cash registers, whose several places of use and business have been situated in all the other States of the United States than those wherein such cash registers have been so manufactured by said concerns respectively,

Statement of the Case.

and have consigned for sale other such cash registers to such dealers, and to their own agents, in such other states; that in pursuance of such sales and upon such consignments, said concerns have respectively been continually shipping such cash registers to such users, dealers and agents in such other States; the number of such users, agents, and dealers being so great, as said grand jurors, upon their said oath, charge the fact to be, as to make it impracticable, if not impossible to set forth a list of them in this indictment; that, by reason of the great cost of such cash registers and as a means of furthering the sales thereof to users, it has been customary for said concerns and dealers to sell such cash registers to users **[700]** upon deferred payments in installments; and that in and by so manufacturing, selling, consigning, and shipping such cash registers into other States than the State of manufacture, each of said concerns has been engaged in trade and commerce among the several States of the United States within the meaning of the act of Congress approved July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said the National Cash Register Company has had certain persons for its principal officers and agents, each of whom, from the day of his becoming such officer and agent to the day of the finding and presentation of this indictment, or, in case he has ceased to be such officer and agent, from the day of his becoming such officer and agent to the day of his ceasing to be such, has been actively engaged in the management of the business and affairs of said the National Cash Register Company, under its authority, and to the full extent of his authority as such officer and agent; and that a list of the names of such of said persons as are known to said grand jurors, showing, so far as known to said grand jurors, the character of their several offices and agencies, and the time of their becoming such officers and agents respectively, and, in case they have ceased to become such officers and agents, the time when they so ceased to become such officers and agents (Christian names unknown to said grand jurors being indicted by initials), is as follows, that is to say: John H. Patterson, president, 1892–1912. [Here follows list of many officers and agents, with dates of service, including defendants charged.]

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said John H. Patterson, Edward A. Deeds, George C. Edgeter, William F. Bippus, William H. Muzzy, William Pflum, Alfred A. Thomas, Robert Patterson, Thomas J. Watson, Joseph E. Rogers, Alexander C. Harned, Frederick S. High, Pliny Eves, Arthur A. Wentz, George E. Morgan, Charles T. Walmsley, Charles A. Snyder, Walter Cool, Meyer N. Jacobs, Mont. L. Lasley, Earl B. Wilson, Jonathan B. Hayward, Alexander W. Sinclair, John J. Range, and Edgar Parks, alias C. D. Foot, and M. G. Keith, W. M. Cummings, J. C. Laird, J. C. Howe and E. H. Epperson, whose Christian names are

Statement of the Case.

to said grand jurors unknown, hereinafter referred to as defendants, being as said grand jurors, upon their said oath, here charge they have been, the persons who have, by virtue of their being such officers and agents of said the National Cash Register Company, controlled and directed the business and affairs of said the National Cash Register Company, unlawfully have, continuously and at all times from the days when, as in this count above set forth, they respectively became officers and agents of said the National Cash Register Company to the day of the finding and presentation of this indictment, or to the days when they ceased to be such officers and agents, in cases where they did so cease to be such officers and agents, at and within said Western Division of said Southern District of Ohio, knowingly engaged and consciously participated in a corrupt conspiracy in undue, unreasonable, direct and oppressive restraint of said interstate trade and commerce so as aforesaid, during such times, carried on by the several concerns in this count above named other than said the National Cash Register Company, each of said defendants then and there well knowing, as he then and there did well know, all the premises in this indictment aforesaid, that is to say, a conspiracy to restrain, and which during and throughout such times has in fact restrained, said last-mentioned trade and commerce by divers unfair, oppressive, tortuous, illegal, and unlawful means, and means which, consideration being given to the advantage over said other concerns held by said the National Cash Register Company in consequence of its resources being, as they were, so great as compared with those of such other concerns respectively, have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce, none of which has been justified or warranted by any letters-patent, a description of which conspiracy and means is now here set forth:

Intending to obstruct, restrict, and restrain the free flow of said interstate trade and commerce so carried on by said concerns other than said the Na- **[701]** tional Cash Register Company, and compel those concerns either to go out of business or to sell and transfer their business and their facilities and instrumentalities for carrying it on to said the National Cash Register Company, so that said the National Cash Register Company could, as in most cases it in fact did, discontinue the business and the use of the facilities and instrumentalities so acquired by it, and thereby effectually and inevitably to eliminate and prevent all competition of such other concerns with said the National Cash Register Company (all of such other concerns being hereinafter referred to as competitors), said defendants, in their several capacities as such officers and agents of said the National Cash Register Company, have, by concerted action and continuous endeavor, carried on the business and affairs of said the National Cash Register Company upon a plan involving—

The inducing, hiring, and bribing of employees and ex-employees [illegible] [illegible]titors of said the National Cash Register Company de- [illegible] wrongfully to disclose to said the National Cash Register

Company the secrets of the business of the concerns by which they were respectively employed, or had been employed, particularly those relating to prospective buyers of cash registers, to customers who had ordered such cash registers, to those who had purchased but had not yet fully paid for such cash registers, to the shipment of cash registers to such customers and to agents and dealers, to the volume of business being done and the places where it was being done by such competitors, to inventions pertaining to cash registers, and to drawings, specifications, claims, and applications for patents for such inventions, and to the financial condition and connections of such competitors;

2. The inducing, hiring, and bribing of employees of carters, truckmen, express companies, railroad common carriers, telegraph companies, and telephone companies, wrongfully and unlawfully to disclose to said the National Cash Register Company the secrets of the business of such carters, truckmen, express companies, railroad common carriers, telegraph companies, and telephone companies, pertaining to the carriage and transportation of cash registers for such competitors, including the number of such cash registers carted or shipped and the names and addresses of the consignees thereof, and pertaining to communications between such competitors and their agents and customers concerning the business of such competitors;

3. The instructing and requiring all sales agents of said the National Cash Register Company to ascertain and report to said the National Cash Register Company all facts and details pertaining to the business and activities of said competitors, and particularly of competitors newly coming into the competitive field, and the employing of agents especially so to do;

4. The using of the influence of said the National Cash Register Company and of its agents with, and the making of unwarranted and false statements to, banking and other institutions, to injure the credit of said competitors and prevent their securing accommodations of money, credit, and supplies convenient and necessary to the carrying on of their business;

5. The instructing and requiring of all sales agents of said the National Cash Register Company to interfere with, obstruct, and prevent in every way possible sales of such competitive cash registers by said competitors, and by agents of said competitors, and by dealers in cash registers, and by any and all means to bring about sales of the cash registers of said National Cash Register Company, and also the displacement of such competitive cash registers and the substitution of the genuine cash registers of said the National Cash Register Company therefor in the hands of users of cash registers; and particularly by making to prospective purchasers of such competitive cash registers false and unwarranted statements derogatory of the same, and false, libelous, and unwarranted statements reflecting injuriously upon the business character and financial credit of such competitors and upon their ability and intention to perform their undertakings and make good their warranties and promises with reference to the sufficiency, operation, repair, and maintenance

Statement of the Case.

of their said competitive cash registers, and offering to sell and selling, to such prospective purchasers of cash registers from said competitors, genuine cash registers of said the National Cash Register Company at prices much less than the regular and standard prices therefor and upon unusually [702] favorable terms as to payments and deferred payments; by inducing, through such false, libelous, and unwarranted statements and through said unusual offers, persons who had already ordered such competitive cash registers to cancel such orders and purchase the genuine cash registers of said the National Cash Register Company; by inducing, through such false, libelous, and unwarranted statements and through such unusual offers, and through offers to make, and making, further reductions in prices of said genuine cash registers of said the National Cash Register Company equivalent to the amounts paid toward the purchase of such competitive cash registers, persons who had purchased, but only partially paid for, such competitive cash registers to repudiate their contracts of purchase with said competitors, and refuse to pay balances due upon such competitive cash registers, and return the same to such competitors; by inducing, through such false, libelous, and unwarranted statements, in some cases persons who had bought and paid for such competitive cash registers, and in other cases persons who had only partially paid for such cash registers, to surrender the same to said the National Cash Register Company in exchange for genuine cash registers of that company upon such basis that those persons would lose nothing on account of their having so purchased such competitive cash registers, for the purpose of exhibiting, and thereupon actually exhibiting, such competitive cash registers, so obtained in exchange, in the windows of stores wherein genuine cash registers of said the National Cash Register Company were on sale, bearing placards, in some cases with the word "junk" printed thereon, in other cases with the words "For Sale at Thirty Cents on the Dollar" printed thereon, and in still other cases bearing words of similar import derogatory of and damaging to said competitive cash registers; by exhibiting and offering for sale to some prospective purchasers of cash registers, cash registers in similitude of any particular competitive cash register any such prospective purchaser was contemplating buying, and this at a price in all cases much lower than the regular price of such competitive cash register and in some cases at a price much less than the manufacturer's cost of such competitive cash register, which cash register so exhibited and offered for sale to such prospective purchaser as aforesaid was one manufactured by said the National Cash Register Company, solely as a so-called "knocker," in such close similitude of the competitive cash register in [illegible]tion as to enable the sales agents of said the National Cash [illegible] Company to represent to such prospective purchaser, and [illegible] purchaser to believe, as was often done, that [illegible] register of such cheap and poor construction [illegible] of money to purchase it or the competitive

[illegible]

Statement of the Case.

cash register to which it was similar, such manufacture of such "knocker" by said the National Cash Register Company being discontinued when it was no longer useful as a "knocker"; by exhibiting and offering for sale, to other prospective purchasers of cash registers, cash registers in similitude of any particular cash register any such prospective purchaser was contemplating buying, and this at a price in all cases much lower than the regular price of such competitive cash register and in some cases at a price much less than the manufacturer's cost of such competitive cash register, which cash register so exhibited and offered for sale to such prospective purchaser as last aforesaid was in each case one manufactured by said the National Cash Register Company in such close similitude of the competitive cash register in question as to enable the sales agent of said the National Cash Register Company to represent to such prospective purchaser, and impel such prospective purchaser to believe, as was often done, it to be a counterpart thereof, when in fact it was a cash register having weak and defective interior mechanism and parts, and one manufactured by said the National Cash Register Company, with such weak and defective mechanism and parts, solely as a so-called "knocker," and for the very purpose of being so exhibited and offered for sale and enabling its sales agents to exhibit to such prospective purchaser such weak and defective mechanism and parts, and falsely claim that the competitive cash register to which it was similar had the same weak and defective mechanism and parts as an argument against his purchasing any such cash register and one in favor of his pur- [708] chasing a genuine but more expensive cash register manufactured by said the National Cash Register Company, and at any rate for the purpose of shortly bringing about a sale of such genuine cash register to such purchaser, in case he insisted on purchasing such "knocker," through the failure of such "knocker" to operate, and for no other purposes, such manufacture of such last-mentioned "knocker" by said the National Cash Register Company being also discontinued when it was no longer useful as a "knocker"; and, finally, by instructing and requiring sales agents of said the National Cash Register Company, and persons employed for that purpose by that company, secretly to weaken and injure the interior mechanism, and remove and destroy parts of such mechanism, of such competitors' cash registers in actual use by purchasers as they could by any means get their hands upon, and this for the purpose of causing, as in many cases it actually did cause, persons who had purchased such competitive cash registers to become dissatisfied with them and substitute for them genuine cash registers manufactured by said the National Cash Register Company;

6. The making, in some cases, by said the National Cash Register Company, to such competitors, and to purchasers and prospective purchasers of such competitive cash registers, of threats to begin suits in the courts against them for infringing and for having infringed its patent rights pertaining to its genuine cash registers, when

Statement of the Case.

as said defendants each well knew, no such patent rights existed and no such suit was contemplated or would really be begun, and such threats were made merely to harass such competitors, purchasers, and prospective purchasers, and deter such competitors from manufacturing and selling such competitive cash registers in such interstate trade and commerce, and such purchasers from using, and such prospective purchasers from buying and using, such competitive cash registers;

7. The beginning, in other cases, by said the National Cash Register Company, against such competitors, and against purchasers of such competitive cash registers, of suits for infringement of patent rights of said the National Cash Register Company pertaining to its genuine cash registers, when in those cases, as said defendants each well knew, no patents upon which such suits could be maintained were in existence or owned or controlled by said the National Cash Register Company, and when, as said defendants each well knew, none of those suits would be further pressed, but all such suits would be kept pending only as long as they served the purpose of harassing such competitors and purchasers;

8. The organizing of cash-register manufacturing concerns and cash-register sales concerns, and the maintaining of them, ostensibly as competitors of said the National Cash Register Company, but in fact as convenient instruments for use in gaining the confidence and obtaining the secrets of said real competitors of said the National Cash Register Company and accomplishing the objects of said unlawful conspiracy; and the making of such use, also, of competitive concerns the ownership and control of which said the National Cash Register Company from time to time secured by the means aforesaid, and this as long as the fact of such ownership and control by said the National Cash Register Company could be kept secret;

9. The inducing, by offers of much greater compensation than they were receiving from said competitors, respectively, agents and servants of said competitors, and dealers patronizing said competitors exclusively to leave the employment of said competitors or cease patronizing said competitors, to enter the employment of or patronize exclusively, said the National Cash Register Company; and this principally for the purpose of embarrassing said competitors and restraining their said interstate trade and commerce;

10. By applying, and causing applications to be made, for letters patent of the United States, in some cases upon the cash registers of said competitors and in other cases upon improvements upon such competitive cash registers, and this merely for the purpose of harassing such competitors by interference proceedings and suits and threats to institute such proceedings and suits; and

11. The using of, or originating and using of, and the instructing and requiring of such agents and sales agents of said the National Cash [illegible] Company to use or to originate and use, such other [illegible] tortious, illegal, and unlawful means, unlaw-

Statement of the Case.

fully, wrongfully, and irresistibly excluding other concerns beside said the National Cash Register Company from engaging in said interstate trade and commerce, as might at any time become, or appear to said defendants or agents or sales agents to be, necessary or convenient (consideration being had for the exigencies of said interstate trade and commerce arising from its being carried on between widely separated places under many differences of condition and demand) for engaging in and accomplishing the above-described objects of said unlawful conspiracy; a description of which said means last aforesaid, other than they were similar in character to the means hereinabove described, said grand jurors are unable to set forth in this indictment, because, as they charge the fact to be, such means were so numerous in kind and so shifting in character as to make such description impossible.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said John H. Patterson, Edward A. Deeds, George C. Edgeter, William F. Bippus, William H. Muzzy, William Pflum, Alfred A. Thomas, Robert Patterson, Thomas J. Watson, Joseph E. Rogers, Alexander C. Harned, Frederick S. High, Pliny Eves, Arthur A. Wentz, George E. Morgan, Charles T. Walmsley, Charles A. Snyder, Walter Cool, Myer N. Jacobs, Mont. L. Lasley, Earl B. Wilson, Jonathan B. Hayward, Alexander W. Sinclair, John J. Range, and Edgar Park, alias C. D. Foote, and M. G. Keith, W. M. Cummings, J. C. Laird, W. C. Howe, and E. H. Epperson, during the three years next preceding the finding and presentation of this indictment, at and within said Western Division of said Southern District of Ohio, in manner and form in this count of this indictment aforesaid, unlawfully have knowingly engaged and consciously participated in a conspiracy in undue, unreasonable, direct, and oppressive restraint of trade and commerce among the several States in cash registers, and one to restrain, and which has restrained, that trade and commerce by unfair, oppressive, tortious, illegal, and unlawful means, and means which have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that said John H. Patterson [and the other defendants named in the first count], at divers times during three years next preceding the finding and presentation of this indictment, at and within said Western Division of said Southern District of Ohio, under the circumstances and conditions, and by use of the means, set forth and described in the first count of this indictment, unlawfully have, by drawing to said the National Cash Register Company and causing that company to grasp it, monopolized a part of the trade and commerce among the several States in cash registers, that

Statement of the Case.

is to say, that part of said trade and commerce which, but for their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner in said first count specified, would, during that period, have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company, mentioned in said first count as having carried on business during said three years; said means being, as in said first count shown and charged, unfair, oppressive, tortious, illegal, and unlawful under said circumstances as against said other concerns, and of a nature, under said circumstances, irresistibly to exclude those concerns from engaging in that trade and commerce; said grand jurors being unable, by reason of the great extent thereof, and because the same are unknown to them, the said grand jurors, to enumerate or describe the items of such trade and commerce in cash registers so monopolized by said defendants; and the allegations of said first count descriptive of such cash registers, of said interstate trade and commerce in the same and the concerns engaged therein, and of the means employed by said defendants to restrain said interstate trade and commerce, and the allegations of said first count as [705] to knowledge, intent, and overt acts on the part of and by said defendants, being by said grand jurors incorporated in this count by reference as fully as if they were repeated in this count as part of the charge of monopolizing in this count made; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said John H. Patterson [and the other defendants named in the first count], having before the period of three years next preceding the finding and presentation of this indictment, in the manner, by the means, and under the circumstances and conditions, mentioned and described in the first count of this indictment, engaged, as said grand jurors, upon their said oath, here charge they did engage, in the unlawful conspiracy in said first count described, and having, in and by so engaging in that unlawful conspiracy, drawn as said grand jurors, upon their said oath, here charge they did draw, to said the National Cash Register Company, and caused, as said grand jurors, upon their said oath, charge they did cause, said the National Cash Register Company to grasp, a part of the trade and commerce among the several States in cash registers, that is to say, that part of said trade and commerce which, but for their so engaging in that unlawful conspiracy and their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner and under the circumstances in said first count specified, would have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company, mentioned in said first count as having

carried on business before said period of three years (said means being, as in said first count shown and charged, unfair, oppressive, tortious, illegal, and unlawful, under said circumstances, as against said other concerns, and of a nature, under said circumstances, irresistibly to exclude those concerns from engaging in that trade and commerce), and each of said defendants well knowing all the premises in this indictment aforesaid, unlawfully have, throughout said period of three years next preceding the finding and presentation of this indictment, continued to hold, conduct, and carry on said interstate business of said the National Cash Register Company, so by said means before said period augmented, and thereby have monopolized said interstate trade and commerce in cash registers; said grand jurors being unable, by reason of the great extent thereof, and because the same are unknown to them, the said grand jurors, to enumerate or describe the items of such trade and commerce in cash registers so as in this count aforesaid monopolized by said defendants; and the allegations of said first count descriptive of such cash registers, of said interstate trade and commerce in the same and the concerns engaged therein before said period of three years, and of the means so employed by said defendants to restrain said interstate trade and commerce, and draw to said the National Cash Register Company, and cause that company to grasp, said interstate commerce, and also the allegations of said first count as to knowledge and intent on the part of said defendants, being, by said grand jurors, incorporated in this count by reference as fully as if they were repeated in this count as part of the charge of monopolizing in this count made against said defendants; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Sherman T. McPherson, U. S. Atty., of Cincinnati, Ohio; *Oliver E. Pagan*, of Washington, D. C.; *Edward Moulinier*, Asst. Dist. Atty., of Cincinnati, Ohio; *O. E. Harrison*, Sp. Asst. Atty. Gen., of Columbus, Ohio; and *John L. Lott*, Sp. Asst. Atty. Gen., of Tiffin, Ohio, for the United States.

John F. Wilson, of Columbus, Ohio, and *Lawrence Maxwell*, of Cincinnati, Ohio, for defendants.

[706] HOLLISTER, district judge. The indictment contains three counts, which may briefly and very generally be described as (1) a charge of conspiracy in restraint of interstate trade in cash registers during the three years preceding the date of the indictment, in the manner and by the means set forth; (2) a charge of creating a monopoly, during the

same three years, of the cash register business by the means and in the manner set forth in the first count; (3) a charge of monopolizing such business, built up and augmented prior to the three years prior to the date of the indictment, through the conspiracy and by the means in the first count described, by continuing the business during those years.

The validity of the indictment is challenged on a number of grounds:

1. Because the matters and things set forth and charged do not constitute an offense against the laws of the United States.

2. Because the provisions of the act of Congress of July 2, 1890 (26 Stat. 209, c. 647), entitled "An act to protect trade and commerce against unlawful restraints and monopolies" are too vague, uncertain, and indefinite to create a criminal offense.

3. Because said act, in so far as it attempts to create offenses and impose penalties, is repugnant to the Constitution of the United States, and especially to section 1 of Article I, and to the provision of the fifth amendment, that no person shall be deprived of life, liberty, or property without due process of law, and to the provision of the sixth amendment, that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation, and to the tenth amendment.

4. Because the averments are too general, vague, indefinite, and uncertain to inform the defendants of the nature and cause of the accusation against them, or to apprise them with such reasonable certainty of the offense with which they are charged or what they may expect to meet on the trial as to enable them to make their defense.

5. Because it is not charged that any of the defendants has done any act to effect the object of the pretended conspiracy, or, if any such act is intended to be charged by the matters and things alleged in [illegible] aragraphs 1 to 11, inclusive, of the first count, the sam[illegible] not charged with sufficient definiteness and certainty [illegible]

6. Because it underta[illegible]

offenses, and is ther[illegible]

[1] Among others, the broad question is here presented whether or not there can be any criminal prosecution under the Sherman Anti-Trust Act. The question is of the utmost importance. There is apparently much diversity of opinion upon it, and the Supreme Court have not yet directly passed upon the subject.

Counsel for defendants admit—as they must, in view of the many decisions of the Supreme Court sustaining civil actions under the act, brought either by the Government or by individuals by virtue of express provisions of the act—that civil actions may be prosecuted, but contend that by reason of alleged vagueness and uncertainty, brought about by the decisions in the *Standard Oil case*, 221 U. S. 1, 31 Sup. [707] Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and the *Tobacco case*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, and because the statute itself fixes no standard of lawfulness or unlawfulness to which the conduct of individuals or corporations may be referred, no criminal prosecution can be based upon it.

The statute is vague and uncertain, they say, because, as they assume, the Supreme Court in *United States* v. *Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and *United States* v. *Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, have held that every restraint of trade, however slight or in whatsoever way it might be regarded at common law, comes under the ban of the statute; that by the later decisions the Supreme Court have interpolated the word "unreasonable" into the statute, and hence no man is advised by the statute whether any act contemplated by him is unreasonable or not; and that, as he can not know, neither can any 12 men who are called upon to determine the quality of his acts, and that one jury might take one view and another jury a different view of the same conduct. Predicating their case on these assumptions, the defendants cite important authorities in support of their conclusion.

The substance of all the decisions relied on by them is found briefly stated by Justice Brewer, sitting with Cald-

Opinion of the Court.

well, Circuit Judge, in *Tozer* v. *United States* (C. C.) 52 Fed. 917, 919:

"In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

The subject is discussed at length in a decision by Judges Baxter, Hammond, and Key in this circuit. *Louisville & Nashville R. R. Co.* v. *Railroad Commission of Tennessee* (C. C.) 19 Fed. 679. The case involved a statute of Tennessee, which created a railway commission, with power to revise tariffs and make new rates, if the present rate "is more than a just and reasonable compensation," or "amounts to unjust and unreasonable discrimination." The act provided, also, that the new rates were to be "a just and reasonable compensation," and if the corporations continued to demand more than that they were subject to indictment, and that "no rates or charges for service in the transportation of freight over any railroad shall be held or considered extortionate or excessive," if the evidence showed that the net earnings from its traffic would not amount to more than "a fair or just return" on a certain valuation. The statute was held invalid, because its provisions were too indefinite, vague, and uncertain to sustain a suit for the penalties imposed, and did not sufficiently define the offenses declared in it.

The same conclusions are found in *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, 19 Am. Cas. 68; *Czarra* v. *Board of Supervisors*, 25 App. D. C. 443, and *Ex parte Jackson*, 45 Ark. 158.

This claimed want of standard is emphasized in *C., B. & Q. R. R.* v. *Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. [708] 278, and *Railroad* v. *People*, 77 Ill. 443, in which, under a [illegible] similar to the Tennessee statute, it was held that the [illegible] of standard in the first section would [illegible], because the eighth sec-

tion provided for schedules of reasonable and maximum rates to be made by the railroad commission. In other words, there was a standard of rates provided by the act to which the railroads could conform.

The defendants justly attach importance to the report of the Judiciary Committee of the Senate, January 27, 1909, upon the then proposed amendment of the Anti-Trust Act that:

"No suit or prosecution by the United States under the first six sections of the said act, approved July 2, 1890, shall hereafter be begun for or on account of this act, or any action thereunder, unless the same be an unreasonable restraint of trade or commerce among the several States or foreign nations."

This committee of eminent lawyers reported adversely, saying (page 10 of their report):

"The Anti-Trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act, as a criminal or penal statute, indefinite and uncertain, and hence to that extent * * * nugatory and void, and would practically amount to a repeal of that part of the act. * * * Justice Brewer, in the case of *Tozer* v. *United States*, 52 Fed. 917, makes this perfectly clear and plain. In this case the defendant was indicted for violating the interstate commerce act, * * * and upon this the court holds: 'In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be definiteness and certainty. * * * No penal law can be sustained, unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.'"

Justice Harlan, in his dissenting opinion in the *Standard Oil Case* (221 U. S. 96, 97, 98, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834), quotes at length from that part of the report which deals with this subject. It is not to be overlooked, however, that the learned justice did not himself express an opinion on the point.

Attorney General Bonaparte and Solicitor General Hoyt, in their briefs in *American Express Co.* v. *United States*, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. Ed. 635, commenting upon the failure of the Elkins Act to limit the word "dis-

crimination" to "undue" or "unreasonable" or "unjust," argue that criminal prosecutions could not be based successfully upon statutes defining an offense with such uncertainty as the use of these adjectives import into them.

But even if defendants' assumption of the effect upon this statute of the decisions in the Standard Oil case and the Tobacco case be acquiesced in, and even if the word "unreasonable" were actually written into the law, there is strong ground for holding that the Supreme Court have in effect already decided the question.

Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417, on error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, involved the Anti-Trust statutes of that State, which made it unlawful for any corporation transacting or [709] conducting any kind of business in Texas to enter into or become a party to any agreement or understanding with any other corporation or individual to fix or regulate the price in Texas of any article of manufacture or merchandise, or to control or limit in Texas the trade in any article of manufacture or merchandise. It was further made unlawful for any such corporation to bring about or permit any union or combination of its capital, property, trade, or acts with the capital, property, trade, or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed or sought to be fixed, regulated or sought to be regulated, or whereby the price in Texas of any such article would be reasonably calculated to be fixed or regulated, or whether the trade in such article would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited.

It was in that case, among other things, insisted that the Anti-Trust laws of Texas were "so vague, indefinite, and uncertain as to deprive them of their constitutionality, in that they punish by forfeiture of the right to do business and the imposition of penalties, under provisions of an act which do not advise a citizen or corporation, prosecuted under them, of the nature and character of the acts constituting a violation of the law." The objections are found in the

words denouncing contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, etc., and acts which "tend" to accomplish the prohibited results.

The Supreme Court held that the Anti-Trust laws of Texas were not in contravention of the Constitution, as depriving anyone of due process of law, because vague and indefinite in the prohibition of acts which "tend" or are "reasonably calculated" to restrain trade and competition. The opinion was delivered by Justice Day, who cites *Tozer* v. *United States* (C. C.) 52 Fed. 917, *Railroad Co.* v. *Dey* (C. C.) 35 Fed. 866, 1 L. R. A. 744, and *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457, and distinguishes the Texas statutes from these, in that those statutes—

"do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

And he goes on to say that the criminal law punishes not only a completed act, but also acts which attempt to bring about the prohibited result, and that it is sufficient if the acts really tend to bring about monopoly and to deprive the public of the advantages which flow from free competition. And he says further (212 U. S. 110, 29 Sup. Ct. 227, 53 L. Ed. 417):

"As to the phrase, 'reasonably calculated,' what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished?"

He notes the fact that the decisions which announce the rules on which his opinion is based are in civil cases arising under the Sherman Anti-Trust Act, but he draws no conclusion from the fact. He also notes that the Texas laws were enacted by the legislature of that [710] State and sustained in its courts, and then says (212 U. S. 111, 29 Sup. Ct. 227, 53 L. Ed. 417):

"We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged

that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden."

There would seem to be little difference in principle between submitting to a jury the question whether certain acts were "reasonably calculated" to bring about a certain result, and submitting to them the question whether acts in restraint of trade were unreasonable or not.

One can not escape the conviction, after considering this decision, that the Anti-Trust acts of Texas are upheld as criminal statutes, not because of the difference in breadth of power given a court or jury to determine the criminality of an act in accordance with their belief in its reasonableness or unreasonableness, as the case might be, or because through process of law one charged with an offense under them could have his day in court, but because the Supreme Court of the United States in *United States* v. *Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the *Addyston Pipe case*, 175 U. S. 237, 20 Sup. Ct. 96, 44 L. Ed. 136, the *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and in *Swift & Co.* v. *United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, have decided that it is not essential, in order to bring a contract or combination in restraint of trade under the act, that its result should be a complete monopoly, but it was sufficient if it really tended to that end, and to deprive the public of the advantages which flow from free competition.

A clear deduction from this would seem to be that while in civil cases it is sufficient that a contract is in restraint of trade in the meaning of the act when it tends to restrain trade, so in criminal cases the same rule should be applied, as it indeed was applied in the Texas case, and that when a contract tends to restrain trade, or the acts complained of are "reasonably calculated," or are acts which "tend" to accomplish the prohibited thing, then the definition of the offense in a criminal statute containing such a description is not vague and uncertain [illegible] it is not undue process of law to permit a jury to [illegible] tendency of the acts proscribed, and whet[illegible] reasonably calculated

in their tendency to accomplish the prohibited thing. In the evolution of the common law to meet changed conditions, an act directly tending to restrain trade, or the purpose of which was to restrain trade, was an unreasonable restraint, because it brought about an injury to the public, caused by enhancement of prices which the common law in the beginning sought to avoid.

The extent to which the Supreme Court have gone in upholding criminal statutes containing adjectives not exactly describing the offense at which the statute is aimed, but leaving room for the exercise by the jury of some discrimination in determining whether or not the acts complained of come within the characterization of the adjective, is illustrated by the case of *Ellis* v. *United States*, 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 598, in which the act [711] of August 1, 1892 (27 Stat. 340, c. 352 [U. S. Comp. St. 1901, p. 2521]), limiting the hours of laborers and mechanics employed by the United States or any contractor or sub-contractor upon any of the public works of the United States to eight hours per day except in cases of "extraordinary emergency." Necessarily, what constitutes an extraordinary emergency is a matter of opinion. Different juries might disagree on the same facts, and yet the court were clearly of opinion that whether or not the facts in the particular case constituted an extraordinary emergency might be left to the jury. And, further than that, the court seemingly have taken advanced ground in the modern desire and process of simplifying and freeing from ancient technicalities the administration of the law in criminal cases by declaring that the judge below did right in instructing the jury that the evidence did not show an "extraordinary emergency" within the meaning of the act. In delivering the opinion of the court, Justice Holmes says (206 U. S. 257, 27 Sup. Ct. 601, 51 L. Ed. 1047, 11 Ann. Cas. 589):

> "Even if, as in other instances, a nice case might be left to the jury, what emergencies are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end. The ruling was correct."

Opinion of the Court.

There seems to be firm ground upon which to base a ruling, even if the word "unreasonable" had been written into the statute, or even if the Supreme Court have read the word "unreasonable" into the statute, that the Anti-Trust Act would not be so vague and uncertain, and so lacking in establishing a standard to which the acts of merchants must conform as to infringe any constitutional guaranties. But it is not true that the decisions in the Standard Oil case and in the Tobacco case have introduced the word "unreasonable" into the statute, or have required the use of that adjective in describing such acts as are to be avoided by those who wish to comply with the law, and it is not true that there is no standard erected by the statute by reference to which a man may know whether or not his acts come within its inhibition.

The Supreme Court say in those cases that the statute must be interpreted in the light of reason, guided by the principles of law, and to effect the purpose the law against restraints of trade always had in view. That purpose originally was to prevent restraints of any kind upon the free flow of commerce, since restraints brought about the attendant evils, particularly the enhancement of prices. The evils were at first supposed to flow from every restraint upon commerce, and the common law forbade any restraint. But in the course of time and under changed conditions it was seen that the application of the common law in its strictness was a bar to the free flow of commerce and proper development of trade, rather than a protection to it; and for that reason, but to accomplish the same purpose, namely, the protection of the public and the preservation of the right of individuals to contract, a rule by way of exception to the common law arose, which looked to the purpose or motive which underlaid contracts or acts in restraint of trade. If the purpose was to injure the public, by limit[712]ing or suppressing competition and the right of individuals to contract, thereby enhancing prices and bringing about monopoly in whole or in part, or tending to do either, then such contracts or acts were held, under the changed condition of things, to be in restraint of trade.

Partial restraints—restraints incidental or collateral to the main purpose of the contract, accidental, secondary, or

remote, and not directly the effect of it—are not regarded as restraints in the view of the law, in that they do not bring about the evils to which the public and individuals are subject by the suppression or the limiting of free competition, which same evils were aimed at by the rule at common law as it was originally and as it, in its evolution to bring about the same ends, has become; that is to say, such restraints are not wrongful. This is clearly pointed out by Chief Justice White in the Standard Oil case, and he shows that that was the state of the law at the time the Sherman Anti-Trust Act was passed, both in England and in the United States (*Standard Oil case*, 221 U. S. 56, 31 Sup. Ct. 514, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834 et seq.), and he shows to the extent of conclusive demonstration that, notwithstanding the apparent decisions in the Freight Association case and in the Joint Tariff Association case, in reality the rule applied in their decision was the same as the "rule of reason" adopted in the Standard Oil case. He proves that the contracts enjoined in those cases were enjoined, not because there might incidentally result some restraint of trade in their operation, but because they operated directly and immediately upon interstate trade, and thereby suppressed or limited competition and created or tended to create monopoly, which results the common law forbade from the beginning. After reviewing the early English cases and acts of Parliament on the subject he says:

"From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law."

And as the conclusion and the summing up of the whole matter he says (221 U. S., at page 58, 31 Sup. Ct. at page 515, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834):

"Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or

other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal of all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, *but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as the enhancement of prices, which were considered to be against public policy.*" (The italics are mine.)

[713] When, therefore, a contract is of such character that it in itself directly brings about a restraint of trade, or tends to do so, it is wrongful, and comes within the description and meaning of the Anti-Trust act. The purpose of such a contract is disclosed on its face, and the contractors will be presumed to intend the consequences it naturally entails. When the acts which are in restraint of trade, or monopolize—which is the same thing (*Standard Oil Case*, 221 U. S. 61, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834)—or tend to monopolize trade, are proved, it is decided that the persons charged are to be held to have intended the necessary and direct result thereof. *Addyston Pipe Co.* v. *United States*, 175 U. S. 216, 243, 20 Sup. Ct. 96, 44 L. Ed. 136.

In *Ellis* v. *United States*, 206 U. S. 246, 257, 27 Sup. Ct. 600, 602, 51 L. Ed. 1047, 11 Ann. Cas. 589, it appears that Ellis attempted to justify the employment on a public work undertaken by him of men for nine hours a day (the statute making such employment for more than eight hours unlawful) on the ground that he had more difficulty than he expected in getting certain oak and pine piles called for by the contract and was in a hurry to get the work done. The trial court instructed the jury that, if Ellis intended to permit the men to work over eight hours, he intended to violate the statute. In passing upon this charge, Justice Holmes said:

"The argument against the instruction is that the word 'intentionally' in the statute requires knowledge of the law, or at least

that to be convicted Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

"In every case," says Chief Justice White, "where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied." *Standard Oil Case*, 221 U. S. 66, 31 Sup. Ct. 518, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834.

From the decisions in the Standard Oil case and in the Tobacco case and in the cases in the Supreme Court involving the Anti-Trust Act, and the evolution of the common law (*Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. 553, 32 L. Ed. 979; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689; *Shawnee Compress Co.* v. *Anderson*, 209, U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865; *Mogul Steamship Co.* v. *McGregor*, L. R. [1892] A. C. 25, as illustrations) to meet modern conditions, and not to unduly restrain, but to encourage, trade, it may be said that a contract, combination, or conspiracy is in restraint of trade when it directly affects trade, and is entered into with intent to do wrong to the general public and to individuals, by restraining the free flow of commerce, and by bringing about or tending to bring about the maintenance or enhancement of prices, which, but for such acts, would adjust themselves [714] under conditions of free competition. Here, then, is to be found the standard of conduct, the absence of which, say the defendants, nullifies the criminal provisions of the Anti-Trust Act. See remarks of the Chief Justice, *Standard Oil Case*, 221 U. S. 58, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834.

The defendants admit, as they must, that ignorance of the law will not excuse them. They must be held, then, to have known that at common law every restraint of trade was

wrongful, and hence that if they did what the indictment charges them with having done, their acts were contrary to the Anti-Trust Act in its literal language; and they must be held to know of the exception to the common law which gives them a wider field of operation—which makes every restraint, brought about with the wrongful purpose of preventing the free flow of commerce and limiting the right of the individual to contract, unlawful. Let the act be interpreted either literally or in the light of reason—that is to say, to effect the purposes of the common law as they were from the beginning, whether meaning any restraint at all, or any restraint brought about by wrongful purpose—the defendants, if the acts charged in the indictment are true, were advised of the prohibitions of the act and the penalties provided therein. If the facts alleged are true, wrongful purpose is disclosed in every one of them. Indeed, if the defendants have in fact done what they are charged with having done, there is exhibited in this indictment a flagrant case of commercial piracy.

While the Supreme Court have not as yet directly sustained the validity of the Anti-Trust Act as a criminal statute, yet the subject has received consideration by eminent authority. The constitutionality of the act has been sustained by Judge Carpenter in the Beef Trust prosecution, in his charge to the jury; by Judge Angell in the Bathtub Trust prosecution, in which he overruled the demurrer to the indictment; by Judge Hand, in the Sugar Trust prosecution; and by Judge Putnam, in the Shoe Machinery Trust case (D. C.), 195 Fed. 578, all since the decisions in the Standard Oil case and in the Tobacco case.

The act does not primarily grant any right to be enforced in a civil action. It creates an offense, a crime, describing what the crime is. To do the acts proscribed in the first and second sections is declared to be unlawful; that is to say, criminal. Hence the right given by section 7 to an individual to recover for injury to his business or property with threefold damages, and the right given by section 4 to the Government to prevent by injunction a continuance of the acts complained of, are rights growing out of the commission of a crime, by whomsoever it may be, whose acts also sub-

ject him to the criminal penalties of the statute. If he has been guilty of a crime described in sections 1 or 2, then he may be restrained by the Government in a civil action, or be compelled by an individual who has been injured in his business or property to respond in threefold damages.

In *United States* v. *Swift* (D. C.), 188 Fed. 92, 95, 96, 97, the so-called Beef Trust prosecution, Judge Carpenter points this out very clearly, showing that the Supreme Court must have considered and passed on the act as a criminal statute in giving effect to the civil [715] proceedings provided by it. And it is most persuasive that Chief Justice White, then associate justice, in his dissenting opinion in the *Freight Association case*, 166 U. S. 290, at page 353, 17 Sup. Ct. 540, at page 563 (41 L. Ed. 1007), says:

"The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled, by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. *Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created.* Thus in *United States* v. *Palmer*, *supra*, Mr. Chief Justice Marshall, referring to the term 'robbery,' as used in the statute, said (3 Wheat. 630, 4 L. Ed. 471) : 'Of the meaning of the term "robbery," as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law.'" [The italics are mine.]

But it is suggested by counsel for defendants that, inasmuch as there is great contrariety of opinion as to the meaning of the law in its operation as a criminal statute, the demurrer be sustained, in order that the Government may, as authorized by law, at once take the case to the Supreme Court for an early decision, and thereby save the time of the court here, and the annoyance and great expense attendant upon such a long trial as would result from the overruling of the demurrer. One can not but appreciate the force of this suggestion, and its adoption would be an easy way to dispose of the matter; but, on the other hand, there is upon this court the plain duty of deciding the case according to conviction, and of so deciding as to make the law

effective, rather than to destroy it if its constitutionality is fairly clear. This is in accordance with the established rule that an act of Congress should not be set aside as unconstitutional unless clearly so. *United States* v. *Coombs*, 12 Pet. 72, 76, 9 L. Ed. 1004; *Presser* v. *Illinois*, 116 U. S. 252, 269, 6 Sup. Ct. 580, 29 L. Ed. 615; *Hooper* v. *California*, 155 U. S. 648, 657, 15 Sup. Ct. 207, 39 L. Ed. 297; *Knights Templars et al.* v. *Jarman*, 187 U. S. 197, 205, 23 Sup. Ct. 108, 47 L. Ed. 139; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.

I hold, therefore, from all of these considerations that the Sherman Anti-Trust Act is a valid criminal statute, sufficiently clear in itself to inform the accused of the nature and cause of the accusation against them, and that criminal prosecutions under it in no way deprive the defendants of liberty or property without due process of law.

[2] If this conclusion is right, the defendants are presumed to know the law applicable to their acts or contemplated acts, and are presumed to intend the consequences of them as heretofore shown. The discussion might end here; but other considerations suggest themselves, which, while perhaps not necessary for decision, are so pertinent as to warrant some reference.

Having in view the purposes of the common law and of the exception which has grown up in its evolution, and appreciating that these purposes are the same, there seem to be compelling reasons for the conclusion that moral considerations are involved in the question [716] of the intent with which an act in restraint of trade is done. Judge Hook puts it this way:

> "There is more of the decalogue in the common law respecting the trading of merchants than is sometimes supposed." *United States* v. *Standard Oil Co.* (C. C.), 173 Fed. 177, 196.

Eminent authority, beginning with Lord Chief Justice Hale (*Taylor's case*, 1 Vent. 293, 3 Keb. 607), have declared that the Christian religion is a part of the law of England. There are in a number of States decisions to the effect that the same is true of the law of the United States, and it is said by Justice Brewer in *Church of Holy Trinity* v. *United*

States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, that the United States is a Christian Nation. No finding on this question is here made, for it is not necessary; but it may safely be said that civilization, as we understand it, so far as the recognition of the individual in the community and his rights are concerned, is the outgrowth of the appreciation that, among many other things, dealings between man and man must be on terms of justice, and justice requires that no man shall build up his business by acts whose purpose is to put the purchasing public at his mercy or to exploit others for his advantage, and destroy thereby the opportunities of others to exercise their talents and desires in the same field of mercantile activity. The common law in many of its phases developed through the appreciation of these rights and is based upon justice in the abstract. It may therefore be said to have a moral basis.

The ancient law against some voluntary restraint put by contract on an individual's right to carry on his particular trade or calling was established because it was deemed that such restraints were injurious to the public as well as to the individuals who made them; and the evils of monopoly are:

"(1) The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; (2) the power which it engendered of enabling a limitation on production; and (3) the danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale." *Standard Oil case*, 221 U. S. 52, 31 Sup. Ct. 512, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834.

It was unjust to the community that a man should contract away his right to do business, and thereby possibly become, with his family, a charge on the community. It was unjust to the community to monopolize a product, and thereby enhance, or have the power to enhance, the prices the public were to pay for it. It was unjust to deprive an individual of his right and power of freely contracting, and of carrying on any lawful business he desired, and selling his product at prices fixed by free competition; and it was recognized that when the evils were brought about by the purpose to inflict them, then that purpose was wrongful, and wrongful because unjust. If in a remote and comparatively barbarous

civilization every contract in restraint of trade was deemed wrong, hence unlawful, because it was thought to work an injury to the public and to individuals, and if in our own time of advanced civilization the contract in restraint of trade is held to be wrong, hence unlawful, because its purpose is to bring about the same [717] injuries, then the motive underlying the contract is the criterion by which the contract is to be judged.

If in the doing of a thing a man entertains a wrongful purpose, he knows it better than anybody else can know it And if, under the law, a man is presumed to intend the consequences of his acts, how much the more must he be held blameworthy when his deliberate purpose is to bring about the evils condemned by the common law from the beginning—condemned because restraints of trade were wrongful to the community and to the individual and wrongful because they were unjust?

It is hard to sympathize with the often-repeated expression that a merchant is not advised by the Anti-Trust act of the character of a contemplated act. If the act is wrong under commonly accepted moral or ethical standards, it was wrong at common law, and wrong under the exception to the common law, and always was and always must be wrong, so long as there is community life, with common and relative rights belonging to each individual in the community and to the public as a whole. How can any fair-minded man engaged in trade, whose deliberate purpose in his acts and contracts in trade is to work injustice to his competitors and to the public, honestly claim want of knowledge of the quality of his acts? The Golden Rule may not as yet be the standard by which the law requires contracts in restraint of trade to be measured, but the ancient adage, " Live and let live," has its application to trade and is a safe rule to go by.

But it is said that contracts and acts in restraint of trade were not criminal at common law. It is unnecessary to decide whether they were or not, for they are made criminal by the Anti-Trust act, and by it the defendants were advised either that it meant every contract in restraint of trade, a

Opinion of the Court.

construction which would hamper rather than encourage trade, or that it meant such contract, the purpose of which was wrongful in the sense so often hereinbefore stated.

The claim that the act is in contravention of section 1 of Article I of the Constitution, which lodges all legislative power in the Congress, and of the tenth amendment, which reserves to the States or the people powers not delegated to the United States by the Constitution, nor prohibited by it to the States, is passed with only the remark that the Supreme Court in the Standard Oil case and the Tobacco Trust case did not attempt to make the law, but merely to declare it, as was their duty, and that it is now somewhat late, in view of the many decisions of the Supreme Court upholding the act in question, to claim that Congress has no power to regulate interstate commerce through the means adopted in this act. *Northern Securities case*, 193 U. S. 197, 347, 24 Sup. Ct. 436, 48 L. Ed. 679.

[3] We pass, then, to the grounds of complaint directed to specific allegations in the indictment itself. It is claimed that the averments in the several counts are too general, vague, indefinite, and uncertain to inform the defendants of the nature and cause of the accusation against them, or to apprise them with such reasonable certainty of the offense with which they are charged, or what they may expect to meet on the trial, as to enable them to make their defense.

The first count describes cash registers, with the statement that for [718] the past 20 years many concerns have been engaged in the business of manufacturing and selling them and sets forth the names of some 33 different cash register companies, and avers that of the total business of making cash registers the National Cash Register Company has done from approximately 80 per cent, early in the period of the 20 years, to approximately 95 per cent at the latter end thereof. It then avers that all the cash register companies during that time have sold the greater portion of their product to users and dealers in all other parts of the United States than those wherein the registers were manufactured, and have consigned registers for sale to dealers. and to their own agents, in other States, and shipping the

same to these various persons, the number of which would be impracticable, if not impossible, to set forth. It then sets forth a list of names of some 137 individuals, who were officers and agents of the National Cash Register Company, and the dates at which each had been actively engaged in the management of the business and the nature of his official relation to the company. Included in the list are the names of 30 persons who are the defendants in the case, and the count charges that by virtue of their official relation to the company they controlled and directed its business from the dates when they became officers or agents, and that they knowingly and consciously participated in a corrupt conspiracy in undue, unreasonable, direct, and oppressive restraint of the interstate trade described and carried on by the several concerns other than the National Cash Register Company; that is to say, a conspiracy to restrain, and which did restrain, such commerce, and by divers unfair, oppressive, tortious, illegal, and unlawful means, and means which, "consideration being given to the advantage over said other concerns held by said the National Cash Register Company in consequence of its resources being, as they were, so great as compared with those of such other concerns, respectively," the defendants "have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce, none of which has been justified or warranted by any letters patent." Then a description of the conspiracy and means are set forth, the effect of which is that the defendants intended to restrain the free flow of interstate trade so carried on by the concerns named, other than the National Cash Register Company, and to compel those concerns either to go out of business or sell and transfer their business to the National Cash Register Company, so that it could, as in most cases it did, discontinue the business of the other concerns so acquired by it, and thereby effectually eliminated and prevented all competition of the other concerns with the National Cash Register Company.

The count then goes on to say that the defendants, as officers and agents of the National Cash Register Company, have "by concerted action and continuous endeavor carried on the business and affairs of said the National Cash Regis-

ter Company upon a plan involving—" Then follow 11 different descriptions of acts, all of a general character, so far as the naming of particular instances is concerned, but all very specific as describing a course of conduct. And the count winds up with the charge that the 30 defendants, "during the three years next preceding the finding and presentation of this indictment [719] at and within said Western Division of said Southern District of Ohio, in manner and form in this count of this indictment aforesaid, unlawfully have knowingly engaged and consciously participated in a conspiracy in undue, unreasonable, direct, and oppressive restraint of trade and commerce among the several States in cash registers, and one to restrain, and which has restrained, that trade and commerce by unfair, oppressive, tortious, illegal, and unlawful means, and means which have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce."

It would manifestly be impossible to set forth in detail each separate transaction and the names of the individuals engaged therein, by which those plans of operation were carried out, without producing a paper so voluminous as probably to warrant the court in striking it from the files of its own motion as needlessly incumbering the record. The names of the individuals who carried on the various transactions, the names of the other cash register companies which were dealt with as alleged, and the quality and character of the acts by which the alleged illegal results were obtained are all clearly detailed. If there were no such transactions, then, of course, the Government would fail; and if there were any innocent transactions through any of these individuals or other employés of the National Cash Register Company who are named, all the facts connected with those transactions are in the possession of the defendants, who know them better than anybody else can know them, and if they are susceptible of an explanation consistent with innocence, the defendants know whom to call in their defense. It would seem that the particulars for which the defendants call are matters of evidence which the Government must produce when it attempts to prove the charges

made by it. *King* v. *Eccles*, 1 Leach, 274; *King* v. *Parsons*, 1 Bl. Rep. 392; *Cope's case*, 1 Strange, 144.

These defendants are charged with a conspiracy in restraint of trade in cash registers generally, and particularly that carried on by the several concerns named. The defendants, as officers and agents of the National Cash Register Company, were in control of its affairs, as alleged. They know the detail of dealings between that company and each of those concerns, and the manner of treatment of them by the National Cash Register Company as the agency through which the officers and agents controlled and operated, and the methods of their respective absorption, if they were absorbed, by the National Cash Register Company. They must know whom to call in each to establish their defense. It seems to me they are advised of the nature of the charges against them quite sufficiently for them to make a defense, and that, under the peculiar circumstances of the case, it is sufficient to set out the character of the acts of the defendants controlling the National Cash Register Company, and that these acts had to do with the various other cash register companies named. While no direct authority may be found completely justifying a charge in an indictment framed as this is, yet I think it meets the rule of particularity of time, place, and circumstances, laid down in *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *United States* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, and other cases.

The Supreme Court say that the object of an indictment is to fur[720]nish the accused with such a description of the charge as will enable him to make his defense and avail himself of his conviction or acquittal for protection against further prosecution for the same cause, and to inform the court of the facts alleged, so that it may decide whether it is sufficient in law to support a conviction, if one should be had. They say that a crime is made up of acts and intents, and that these must be set forth in the indictment with reasonable particularity as to time, place, and circumstance. The facts alleged reasonably meet this test. In this connection the remarks of Mr. Justice Holmes in *Swift & Co.* v. *United*

States, 196 U. S. 375, 395, 396, 25 Sup. Ct. 276, 49 L. Ed. 518, and of Judge Adams in *Smith* v. *United States*, 157 Fed. 721, 725, 85 C. C. A. 353, may be read with profit.

[4] In early times, and extending up to not a very remote period, when there were many capital offenses which would now be regarded as comparatively trivial, indictments were subjected to the closest scrutiny by the judges, and reasons in the highest degree technical were availed of to save the infliction of the severest penalty. Those reasons no longer obtain, and the effort now on the part of the judges is to overlook technicalities, so far as possible, and to administer the law from a broad viewpoint looking to ultimate justice upon the merits of the particular case. This ground of demurrer is therefore held to be untenable.

On the ground that no offense against the laws of the United States is charged in the indictment, in addition to other grounds of demurrer going to the same point, the defendants claim the indictment is otherwise fatally defective in that, according to my understanding of their contention—

[5] (1) The Anti-Trust Act is one of generic terms, as frequently stated in the Standard Oil case and in the Tobacco case, and it is not sufficient to charge a crime in the general language of such a statute; but the specific acts constituting the offense must be set forth with reasonable particularity of time, place, and circumstance, as said in *United States* v. *Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be by common law or statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars."

And a number of cases are cited. This claim involves considerations already referred to. If the first count is examined with care, it will appear (page 2) it is charged that during 20 years prior to the finding of the indictment many concerns were engaged in competition with each other in the manufacture and sale of cash registers, and a list of such concerns as were known to the grand jurors was set forth. On pages 10 and 11 of the indictment the defendants are charged with having entered into a conspiracy in re-

Opinion of the Court.

straint of said interstate trade carried on by the several concerns named, intending to restrain the free flow of interstate trade, and (page 20) defendants are charged with—

"a conspiracy in undue, unreasonable, direct, and oppressive restraint of trade and commerce among the several States in cash registers, and one to [721] restrain, and which has restrained, that trade and commerce by unfair, oppressive, tortious, illegal, and unlawful means, and means which have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce."

We are dealing with the first count, for the others refer to it, and it will be seen from a consideration of the entire count that not only is the general charge made of restraint of trade in cash registers, but the specifications go to that part of interstate trade in cash registers which these certain concerns other than the National Cash Register Company carried on. The authorities are numerous that a contract in restraint of trade is unlawful if it directly restrains or tends to restrain that trade, or its purpose is to accomplish either of these ends. It would seem that when there is a general charge of restraint of all trade in cash registers, and the specific facts alleged show that, if true, the defendants have restrained a part of that trade, an offense against the laws of the United States has been alleged.

(2) The defendants claim also that there is really no charge of conspiracy to do the things set forth in the indictment, but that the charge amounts to nothing more or less than that the defendants did the things described in the indictment; that is to say, the indictment charges that in carrying on their business the defendants did the things charged with intent to restrain the free flow of interstate commerce, but does not charge that the defendants agreed, or combined, by concerted action to accomplish an unlawful purpose, and that it charges the concerted action, or the "concurrent action," as being the conspiracy itself.

There seems to be no merit in this claim, for the reason that the defendants are distinctly charged with conspiracy in the direct restraint of trade in cash registers, and particularly the trade in cash registers carried on by the several cash register companies other than the Nationa
ister Company named, and that they adopted a

Judge Noyes, in *United States* v. *Patten* (C. C.) 187 Fed. 664.

I agree with Judge Holt in *United States* v. *Kissel* (C. C.) 173 Fed. 823, 825, who expresses the opinion that:

"Under this statute (Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676]) a mere conspiracy is not an offense; but, in addition to the conspiracy, one or more of the parties to it must do some act to effect its object before a criminal prosecution can be maintained. * * * This indictment is necessarily brought under these provisions of the Sherman Act. No indictment can be brought in the United States courts for the offense of conspiracy at common law, because it has not been made an offense by any United States statute. Nor could this indictment have been brought under section 5440 of the United States Revised Statutes, because there is no law of the United States making a conspiracy in restraint of trade or to monopolize trade an offense against the United States except the Sherman Act, and there can not be a conspiracy to engage in a conspiracy. Under the Sherman Act no overt act is necessary to the commission of the offense. That provides that every person who engages in a conspiracy in restraint of trade or commerce, or to monopolize trade, is guilty of the offense."

This ground of demurrer is, therefore, held to be untenable.

[8] The defendants claim, further, that the second count in the indictment is bad, in that it charges that the defendants (page 21)—

"by drawing to said the National Cash Register Company and causing that company to grasp it, monopolized a part of the trade and commerce among the several States in cash registers, that is to say, that part of said trade and commerce which, but for their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner in said first count specified would, during that period, have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company, mentioned in said first count as having carried on business during said three years."

The objection is twofold. The first is that the "part" of trade referred to is not a part of trade and commerce within the meaning of the Anti-Trust act, and the Standard Oil case is cited, wherein it is said (221 U. S. 61, 31 Sup. Ct. 516, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834):

"The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographi-

Opinion of the Court.

cal and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

The point of the objection probably is that the whole business of making and selling cash registers, as described in the first count, would only be a part of interstate commerce, and therefore it is not sufficient to allege a monopoly by drawing to the National Cash Register Company the business of the competitors mentioned; that is to say, a monopoly of a part of the part. I am unable to follow this, nor to fit the citation to the argument; for, if it is true that these defendants have drawn into the National Cash Register Company the business in cash registers that the other concerns named would have done, and through the means described in the first count, the defendants inevitably have monopolized a part of the business of making and selling cash registers.

[724] In the second place, it is pointed out that the monopoly charged consists of drawing to the National Cash Register Company the business which would have been secured or retained by the other divers concerns "mentioned in said first count as having carried on business during said three years," when there are no concerns named in the first count as having carried on business during three years next preceding the finding of the indictment.

It is true there is no such allegation in the first count, and the indictment is defective in this regard; but the defect is not necessarily fatal, for it is equally true that in the first count it is alleged that those divers concerns during 20 years previous to the finding of the indictment have been engaged in the business of making and selling cash registers. If they were, then they must have carried on the business during the three years preceding the finding of the indictment. Further than this, it may be said that the words "as having carried on business during said three yea[illegible]" following the words "mentioned in said first count[illegible] [illegible]nt be treated as surplusage. However that may be, t[illegible] [illegible]aning of the pleader is plain; hence the manner of [illegible] defendants. In such case th[illegible] than destroy the indictm[illegible]

Opinion of the Court.

[9] The same point is raised among the objections to the third count, and is here dealt with in the same way. The chief specific attack on the third count is that it charges only a continuance of the result of an alleged crime and does not charge any coöperation to keep it up, and is, therefore, bad under the rule stated in *United States* v. *Kissel*, 218 U. S. 601, 607, 31 Sup. Ct. 124, 125 (54 L. Ed. 1168):

"The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States* v. *Irvine*, 98 U. S. 450 [25 L. Ed. 193]. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous coöperation of the conspirators to keep it up, and there is such continuous coöperation, it is a perversion of natural thought and of natural language to call such continuous coöperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success."

This count charges the defendants with having, before the period of three years prior to the date of the finding of the indictment, in the manner and by the means described in the first count, engaged in the conspiracy therein described, and having monopolized that part of the interstate trade in cash registers its said 33 competitors would have secured or retained, unlawfully, with knowledge, "continued to hold, conduct, and carry on said interstate business of said the National Cash Register Company, so by said means before said period augmented, and thereby have monopolized said interstate trade and commerce in cash registers." The charge, then, is that, having monopo[725]lized the trade through the conspiracy and the means set forth in the first count, the defendants are guilty of monopolizing the trade continually for the three years prior to the date of the indictment; that is to say, the conspiracy having ended and

the monopoly accomplished three years prior to the date of the indictment, the defendants have, during the ensuing three years, monopolized by continuing to carry on the business of the National Cash Register Company augmented by the conspiracy and by the means charged in the first count.

Let us suppose a case in which a concern has built itself up into greatness, enormous wealth, and practically sole possession of the trade in its particular commodity by means such as described in this indictment and by the destruction or absorption of its competitors. The peace of desolation reigned in that trade, because its competitors were not, and it enjoyed the field alone. Thereupon its evil practices were abandoned, because there was no further occasion for them, and the three years within which, under the statute of limitations, a criminal action might be brought against it for its unlawful acts had elapsed. Is not such a concern, so built up, still a restraint of trade and a monopoly (which is the same thing), and will it not continue to be a restraint of trade and a monopoly so long as it exists?

The first section of the Anti-Trust act is aimed at contracts, combinations, and conspiracies in restraint of trade. The second section reads:

> "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

Herein are found three distinct offenses, perhaps four: Monopolizing, attempting to monopolize, and combining or conspiring to monopolize. Monopolization and attempting to monopolize are held to be distinct offenses. *United States* v. *American Naval Stores Co.* (C. C.), 186 Fed. 592. And the charge of monopolizing will support a verdict of attempting to monopolize. 1 U. S. Comp. St. 1901, p. 723.

A conspiracy to monopolize trade is one thing, and it is very like a conspiracy in restraint of trade; but the monopoly is the result of the conspiracy. It is the accomplished thing. But the statute makes the act of monopolizing also an offense, and the third count charges the defendants with that off[illegible] three years prior to the date of the indict[illegible]dgment this is a good count. That

there can be a continuing monopoly such as described in this count has not been decided in any reported case, but the Government's claim finds ample support in many expressions in the opinions of judges in a number of cases. *Standard Oil case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834; *Tobacco Trust case*, 221 U. S. 176, 185, 31 Sup. Ct. 632, 55 L. Ed. 663; *United States* v. *American Naval Stores Co.* (C. C.), 172 Fed. 455, 458; *United States* v. *Standard Oil Co.* (C. C.), 173 Fed. 177, 191; *United States* v. *Swift & Co.* (D. C.), 186 Fed. 1002, 1013.

But, it is said, if there was any continuing monopoly it was maintained by the National Cash Register Company and not by the defend[726]ants, and, further, that if a monopoly has been established as alleged, it will continue, even though these defendants may have died or have sold their stock to others, and, further, that every employé of the company, however innocent, is guilty under the statute so long as he is connected with it.

Whether or not, the company continuing to carry on business, the heirs at law or the transferees of these defendants, or other employés than the defendants, would be liable to indictment for monopolizing under the act, is not necessary to be decided now. We are concerned with the alleged acts of these defendants. It is distinctly charged (p. 10 of the indictment) that they are the persons who "controlled and directed the business and affairs of said the National Cash Register Company."

The monopoly the defendants have built up is carried on by them under the name of the National Cash Register Company, controlled by them. That is what the averments in this indictment amount to. In the view of the Anti-Trust Act, the name or form, however intricate or subtly devised or maintained, under which the evils of monopoly are carried on, is altogether immaterial. No device, however skillfully contrived, and no combination by whomsoever formed, is exempt from the operation of the law, if such device or combination by its operation directly restrains commerce among States. *Northern Securities case*, 193 U. S. 197, 347, Ct. 436, 48 L. Ed. 679. In the *Tobacco case*, 221

Opinion of the Court.

U. S. 106, at pages 180, 181, 31 Sup. Ct. 632, at page 648 (55 L. Ed. 663), Chief Justice White says:

"* * * In the Standard Oil case * * * it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute."

[10] Finally, it is said the indictment is bad for duplicity. This may be dealt with briefly. The offenses charged grow out of the same transactions, are of the same class, and each count charges a separate and distinct offense. They may be joined in one indictment. Rev. Stat. U. S. § 1024 (U. S. Comp. St. 1901, p. 720); *Pointer* v. *United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; *Terry* v. *United States*, 120 Fed. 483, 56 C. C. A. 633; *State* v. *Bailey*, 50 Ohio St. 636, 36 N. E. 233.

It is true that the offense of monopolizing charged in the third count is committed every day during the continuance of the monopoly, and no count may contain more than one offense; but it is the same monopoly, the continuance of which during the three years is complained of, and in reality there is but one offense, brought about through the conspiracy and illegal acts the defendants are charged with prior to the three years. But the defendants are not charged with continuing a monopoly. They are charged with monopolizing by continuing to carry on the business of the National Cash Register Company aug[727]mented prior to the three years by the illegal means set forth in the first count. The illegal acts complained of have resulted in only one monopoly. A monopoly, when established, is in its very nature a continuous offense. It is here that Justice Holmes' remarks in *United States* v. *Kissel*, 218 U. S. 601, [illegible]7, 31 Sup. Ct. 124, 126 (54 L. Ed. 1168), are applicable. [illegible]ys:

"[illegible] the plot contemplates bringing to pass a continuous re-[illegible] without the continuous coöperation of the

Syllabus.

conspirators to keep it up, and there is such continuous coöperation, it is a perversion of natural thought and of natural language to call such continuous coöperation a cinematographic series of distinct conspiracies, rather than to call it a single one."

It is true he was speaking of conspiracies, but the reasoning which proves a continued conspiracy to be only one rather than a series of distinct conspiracies would demonstrate the unity of a continued monopoly.

For all of these reasons the indictment is held to be valid, and an order overruling the demurrer may be taken.

UNITED STATES *v.* PATTERSON ET AL.[a]

(District Court, S. D. Ohio, W. D. February 3, 1913.)

[205 Fed. Rep., 292.]

MONOPOLIES (§ 12)—RIGHTS GIVEN BY PATENT—ANTI-TRUST ACT.—Both the patent laws and the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) were enacted under constitutional authority, and they must be construed together, giving full force and effect to each so far as that may be done. That a patentee, by putting his invention to use, has become entitled to a monopoly in its manufacture and sale, and that his competitors in interstate commerce therein are infringers of his patent, does not give him a right to resort to methods of unfair competition to force the competitors out of business; and such action, pursuant to a conspiracy or combination, is in restraint of interstate commerce, and in violation of the Anti-Trust Act.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 31)—ANTI-TRUST ACT—PROSECUTION FOR VIOLATION—DEFENSES—EVIDENCE.—Defendants, who were officers and agents of a manufacturing corporation, were indicted for conspiracy and combination in restraint of interstate commerce in cash registers

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[a] For opinion of District Court overruling demurrer to indictment (201 Fed. 697), see *ante*, page 1.

For opinion of Circuit Court of Appeals reversing conviction (222 Fed. 599) see *post*, page 60.

Petition for writ of certiorari denied (238 U. S. 635), June 14, 1915.

[b] Syllabus copyrighted, 1913, by West Publishing Company.

Statement of the Case.

and for monopolizing such commerce in violation of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). On the trial the Government introduced evidence tending to show the conspiracy, and that in pursuance thereof defendants, by methods of unfair competition, had forced competitors in interstate commerce in cash registers to go out of business and sell their plants to defendants' company. *Held*, that evidence offered by defendants to show that their company was the owner of certain patents, and that the machines made and sold by such competitors were infringements, did not tend to establish a defense, and was irrelevant and incompetent, unless in connection with other evidence showing that the fact of infringement, and not defendants' unlawful acts, was the cause of the competitors going out of business.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

Criminal prosecution under the Sherman Anti-Trust Act by the United States against John H. Patterson and 29 others, officers and agents of the National Cash Register Company. On objection by the Government to certain evidence offered by defendants. Objection sustained.

[293] The defendants were indicted by a grand jury in the District Court of the United States for the Southern District of Ohio, on three counts, which may briefly and very generally be described as: (1) A charge of conspiracy in restraint of interstate trade in cash registers during the three years preceding the finding of the indictment, in the manner and by the means set forth; (2) a charge of monopolizing the cash-register business during the same three years, by the means and in the manner set forth in the first count; (3) a charge of monopolizing such commerce, built up and augmented prior to the three years prior to the date of the indictment, through the conspiracy and by the means in the first count, by continuing the business during those three years. The indictment is set out at length in *United States* v. *Patterson* (D. C.) 201 Fed. 697, 699, et seq.

In the first count it was charged that the defendants, as officers and agents of the National Cash Register Company, controlled and directed the business and affairs of the company and conse[illegible] in a conspiracy in restraint of inter[illegible] registers, carried on by the several [illegible] competitors, whose names

Statement of the Case.

are set forth, and did in fact restrain the same by certain illegal and unlawful means, and thereby wrongfully and irresistibly excluded others from engaging in that trade, none of said acts being justified or granted by letters patent, a description of the conspiracy and means being set forth as follows:

"Intending to obstruct, restrict, and restrain the free flow of said interstate trade and commerce so carried on by said concerns other than said the National Cash Register Company, and compel those concerns either to go out of business or to sell and transfer their business and their facilities and instrumentalities for carrying it on to said the National Cash Register Company, so that said the National Cash Register Company could, as in most cases it in fact did, discontinue the business and the use of the facilities and instrumentalities so acquired by it, and thereby effectually and inevitably to eliminate and prevent all competition of such other concerns with said the National Cash Register Company (all of such other concerns being hereinafter referred to as competitors), said defendants, in their several capacities as such officers and agents of said the National Cash Register Company, have by concerted action and continuous endeavor carried on the business and affairs of said the National Cash Register Company upon a plan involving."

Then follow 11 different descriptions of acts as the means through which the alleged conspiracy was carried into effect for the purpose of bringing about the restraint of trade complained of.

The Government introduced evidence tending to show that the National Company had bought out the Lamson Cash Register Company, of Lowell, Mass., and a number of other cash registers, from time to time. When the Government rested its case, the defendants put a patent expert on the stand, to whom defendants' counsel exhibited a Lamson cash register with a case on it, and a Lamson cash register with the case taken off it, and asked the witness to state to the jury whether he found in this machine the invention covered by the Ritty and Burch patent. That patent was owned by the National Cash Register Company. The Government objected to the testimony, and the court made the ruling set forth in the opinion.

Sherman T. McPherson, U. S. Atty., of Cincinnati, Ohio, *Edward P. Moulinier*, Asst. U. S. Atty., of Cincinnati, Ohio,

Opinion of the Court.

O. E. Harrison, Sp. Asst. Atty. Gen., of Columbus, Ohio, and *John L. Lott*, Sp. Asst. Atty. Gen., of Tiffin, Ohio.

Lawrence Maxwell, of Cincinnati, Ohio, *John S. Miller*, of Chicago, Ill., *John F. Wilson*, of Columbus, Ohio, and *John A. McMahon*, of Dayton, Ohio, for defendants.

HOLLISTER, District Judge (after stating the facts as above).

The importance of the question involved in the argument is such that it would hardly suffice to merely make a ruling either sustaining or [294] overruling the interrogatory put to the witness. I have thought it best to give the reasons why the ruling is made as it is made, so that all may understand.

It is agreed by counsel that the interrogatory propounded to the witness James W. See, a patent expert, raises the question whether or not evidence may be introduced by the defendants of the character and scope of the patents owned by the National Cash Register Company, and whether or not the various competitor companies named in the indictment (the question immediately concerns only the application of the testimony to the transactions with the Lamson Cash Register Company) were infringers of those patents. The claim is made by counsel for the defendants that there can be no such thing as a free flow of commerce or trade in articles made in infringement of a patent, and this is on the ground that a patentee has a monopoly by virtue of the laws of the United States enacted in pursuance of constitutional authority. They say that a patentee, having a lawful monopoly by the operation of the patent laws, cannot be charged with monopolizing under the Sherman Anti-Trust Act. I pass the question, if it is a question (it was not argued or referred to), that the defendants are not the patentees of cash registers, nor is it charged that the National Cash Register Company, as such, said to be the owner f many hundreds of patents on cash registers, was a party e alleged conspiracy or illegal monopoly.

ʻheir claim upon the statement, found in it a patentee has a monopoly, and

particularly upon the language of the Circuit Court of Appeals in the Seventh Circuit, Judges Grosscup, Baker, and Kohlsaat sitting, in the case of *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358, at page 362, 83 C. C. A. 336, at page 340, in which Judge Baker, delivering the opinion, said:

"Under its constitutional right to regulate interstate commerce Congress made illegal 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States,' and subjected to liability to fine or imprisonment 'every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States.' Congress, having created the patent law, had the right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman Law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed prefessedly to advantage the public; the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several States."

Judge Grosscup concurred in the judgment of the court, but took occasion to say (154 Fed. 364, 83 C. C. A. 342):

"But I am not prepared to hold that patented articles are never, under any circumstances, articles of trade or commerce among the several States, within the meaning of the Sherman Act, and do not think that that premise is essential to the conclusion arrived at."

This language of Judge Baker was cited by counsel for defendants in support of his argument that the restraint of trade contemplated by [295] the act could only be with reference to a trade which in itself might rightfully be carried on; that there could be no restraint of a trade of which the patentee has a monopoly by law; that there can be no conspiracy in restraint of such trade or illegal monopoly of it, when the one charged has a legal monopoly under the patent law. So far is the argument carried that counsel frankly claim in it that no matter how illegal the acts charged were in themselves, not conceding their illegality at all, infringers had no right to engage in their infringing trade, and the patentee had the legal right to protect his monopoly, even

with the strong arm. Counsel for the Government, not admitting infringement on the part of any of the competitors of the National Cash Register Company, and assuming, for the purpose of the argument, that they were infringers, argue that the question is not material to any issue in this case.

Defendants urge: That a patent is a property right; so it is. That it may be assigned; so it may be under the patent laws. That is descends to the heirs at law; the Supreme Court has so held. But counsel have cited no case—if there had been one they would have found it—and the assertion, usually of doubtful wisdom, may in this connection be safely made that no decision will be found sanctioning acts of violence by a patentee in the protection of his patent right, acts of violence against the claimed infringing article, or the business of infringers. And it may also be safely said that, at least until the patentee has established the validity of his patent and the fact of infringement, he will not be permitted by a court of equity, and at the suit of even one who may eventually be held to be an infringer, to engage in acts of unfair competition. *Farquhar Co.* v. *Harrow Co.*, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755; *Adriance Platt Co.* v. *Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163; *Dittgen* v. *Paper Goods Co.* (C. C.) 164 Fed. 84; *Paper Goods Co.* v. *Dittgen*, 171 Fed. 631, 96 C. C. A. 433; *Renovator Co.* v. *Vacuum Cleaner Co.* (C. C.) 189 Fed. 754, 1023.

The claim is made that the patentee, having a property right, may protect his property by destroying the property of an infringer, on the same principle that he may cut off the limbs of his neighbor's trees projecting into his yard, or cut off his neighbor's eaves projecting over his land, or may in some cases abate nuisances, etc.; but this claim involves a misconception of the nature of property in a patent, as will be shown. It is said that a patentee may destroy infringers' business by acts of unfair competition, in self-defense; but even in criminal law the old rule was that one could defend on the ground of self-defense when he was driven to the wall, and only then.

In Ohio the rule is that self-defense may be urged in cases [illegible] the accused believes, and has reasonable ground for

believing, that he is in danger of losing his life, or of great bodily harm. He may then defend to the extent of taking life, if necessary; but surely in trade a wrongful act is no justification for another wrongful act in retaliation.

It is obvious that the question involves the nature of a patent right. There is much confusion and loose language on the subject. It is a right of an intangible character. The result of the idea involved in the [296] patent, embodied in a machine for instance, is the tangible thing. The thing itself may not be used as against the police laws of the State looking to the health, comfort, and welfare of its citizens. It may be taxed. It may be taken on execution. Not so with a patent right itself. A man may have a valuable patent, for instance, on a combination of ingredients making an effective explosive; but his right to use and his process of making or conveying the same may be guarded by laws in such a way as to restrict the great gain he might otherwise make through the exercise of his patent right, though he would still have the right to exclude all others from interfering with his patent right. The patent right, and the article embodying the discovery or invention, are two distinct and entirely different things.

A man may make a valuable discovery. He can disclose it, or not. He cannot complain if somebody else makes the same discovery, and takes from him the benefit of his discovery. If he discloses it, the discovery is common property. He may, however, obtain a patent, and if he has not made public use or sale of the article within two years from the date of his application for a patent, he is given certain rights. These are found in the laws of Congress, for he does not have them of common right; nor without his patent, does he have any right to his discovery not shared in by the whole community; and when he gets those rights, he has them only by virtue of the patent laws. If the patent is valid, he may for 17 years restrict, to the extent of exclusion, the rights which the rest of the community would otherwise have. Therefore the laws of Congress must be looked to in order to determine what it is that he gets, for he has no patent right except such as there found. These will be

searched in vain for an express grant of monopoly to him. At best, they contain a potential monopoly. He may have a monopoly if he takes the steps which the law provides, through which a monopoly may be obtained. He may bring an action at law for damages against an infringer, and get them, if he proves the infringement. He may go into a court of equity and obtain an injunction against an infringer, if he establishes the infringement, or he may have a preliminary or temporary restraining order upon a prima facie showing of infringement. But he may only bring these actions in the courts of the United States as Congress provides; he is not at liberty to go into courts of general jurisdiction in the States, or bring his suits in the courts of the United States on the ground of diversity of citizenship. The courts of the United States are open to him, because Congress says so, and they have exclusive jurisdiction; therefore he has no common right of property in his patent right which he may enforce in any jurisdiction having general equity and law powers. He has a right to a monopoly, and he has a lawful way by which it may be brought about as established by Congress.

Now, the *right* to have a monopoly and *having* a monopoly are quite distinct. A patentee manufacturing an article under the teachings of his patent may dislike litigation. He may be unwilling to go to the expense and annoyance of pursuing infringers in the courts. His profits from his own manufacture and sale may be so great that he [297] does not care how many infringers are in the field, or to what extent their articles are in competition with his. Has he a monopoly? If those infringers are sending their product into distant States to customers, agents, or dealers, can the fact be successfully disputed that the infringers are engaged in interstate commerce? The Supreme Court say that commerce among the States is not a technical conception, but a practical one, drawn from the course of business. Can it be denied that the infringers' products are in competition with the patentee's under such circumstances? Such a patentee has no monopoly, in fact; but he may have one if he takes the steps Congress has provided by which a monopoly may

be secured to him. If a patentee locks the paper evidence of his patent right in his safe for the 17 years of the patent's life, and in the meantime great industries have grown up, flourishing upon the manufacture and sale of the infringing articles shipped to all parts of the country, what monopoly has he under the circumstances? Is his monopoly inherent in the patent right itself, of itself, without anything more? And during these 17 years are not those conducting such industries—in ignorance, it may be, of the patent—carrying on a legal business as of common right? Can the patentee, during the 17 years, sally forth with torch and ax, commit acts of unfair competition, and, with or without establishing his patent, destroy those industries, claiming to be the owner of a monopoly as of right, when in fact the monopoly does not exist? And has not Congress power under the commerce clause of the Constitution to protect a commerce which actually exists and in great volume, at least until the patentee has established his monopoly by enjoining all infringers? These questions seem to me to answer themselves.

A part of the patent right is the expressly granted power to bring suits to exclude all infringers. The patentee has no sanction under the patent laws to exclude infringers in any other way. It cannot be successfully denied that the rights a patentee has are limited and restricted by the laws which Congress has seen fit to enact on the subject, because the common right of others is interfered with and the exercise of it prevented only because Congress has, as a reward to the inventor, given him certain privileges through the exercise of which he may reap a benefit to himself, and the sole benefit to himself, of the results of his genius, in derogation, for a limited period, of the common right of all others.

The patent laws were enacted in pursuance of constitutional authority. The Sherman Anti-Trust Act was passed in pursuance of constitutional authority. They must be construed together, giving full force and effect to each, so far as that may be done, if it can be done, unless the requirements of the particular case necessarily render one or the other, as the case may be, inoperative.

Opinion of the Court.

The Supreme Court say of the agreements complained of in the *Bath Tub Trust case*, 226 U. S. 20, at page 48, 33 Sup. Ct. 9, at page 14 (57 L. Ed. 117), decided November 18, 1912:

> "They transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law."

[298] And again, at page 49 of 226 U. S., at page 15 of 33 Sup. Ct. (57 L. Ed. 117):

> "Rights conferred by patents are indeed very definite and extensive; but they do not give, any more than other rights, an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

And as recently as January 20, 1913, the Supreme Court, in *Virtue* v. *Creamery Package Manufacturing Co.*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. 404, say:

> "Of course, patents and patent rights cannot be made a cover for a violation of law. * * * But patents are not so used when the rights conferred upon them by law are only exercised."

Briefly, the Sherman Anti-Trust Act makes it unlawful to conspire in restraint of interstate trade, or to monopolize or attempt to monopolize the same. The Supreme Court have described a conspiracy as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not unlawful in itself, by criminal or unlawful means. The act does not expressly except articles infringing a patent, nor does it refer to such articles entering into interstate commerce and in actual competition with a patented article.

It is lawful for a patentee to exclude such competition. The patent laws expressly provide that he may do so, and how he shall do it, and even if the combination or agreement complained of were to accomplish even a lawful thing, namely, the monopoly a patentee may have, still, under the definition of a conspiracy, that may not be attained by unlawful means; and if those unlawful means are in fact in restraint of competitive business actually a part of interstate

commerce, then the patentee has undertaken to accomplish in a wrong way what he could do in a lawful way.

The intention of the defendants here, so far as it is disclosed by counsel, is to show by this evidence that all of these competing companies were infringers of the National Cash Register Company's patents. If, indeed, they were, such a question can be tried only in the way the statutes have provided, by an action for damages or in injunction proceedings. This is not the forum, in such a case as this, to try such a question. One reason is that the prosecution would have to prove to the satisfaction of the jury beyond a reasonable doubt that the competitive concerns were not infringers. Such a burden is never imposed in the trial of such an issue; on the contrary, the burden is upon the patentee to prove by a preponderance of the evidence that he has a valid patent and that an infringement of his patent exists. Even if, as a matter of law and fact, the competing concerns are infringers, that ultimate fact cannot be ascertained until a court of equity, if an injunction is sought, or a court of law, if damages only are sought, have determined—in the latter case with the assistance of a jury—that the patentee has proved by a preponderance of the evidence that his patent has been infringed by the defendant. Until that is done the infringer may not know that he is an infringer. He may think, and think honestly, that he is engaging in his particular [299] business as a matter of common right, and combat the patentee's just claim with as pure motives as can control the action of the patentee. Consequently all courts having jurisdiction, State or Federal, without regard to the patent laws, may enjoin acts by a patentee in restraint of the trade of the plaintiff, until the defendant, the patentee, establishes his right to exclude the plaintiff from trade which, until infringement is established, is recognized as being carried on of common right, no matter how much he may compete, and no matter how much the article or the business complained of may compete in the meantime with the patented article or the business through which it is put upon the mar-
A patentee may properly warn the offending compet-
manufacturer, and may call attention to his patent and

his claim of infringement; but when he threatens suit and does not bring it, or engages in acts of unfair competition, a court of equity will say to him:

Hold your hand; if you really have a patent, if the competitive concerns of which you complain are really infringing your patent, take the method the patent law has given you of establishing your monopoly by excluding your competitors, by enjoining them or seeking damages in the courts of the United States; otherwise, you interfere with your competitors' business at your peril.

If the principle involved in the attitude of courts of equity in such cases is correct—and it is well established—what becomes of the claim that the patentee is granted a monopoly by the patent laws? He has no monopoly. In such cases the question of infringement is not even an issue, and the court would not try it for the patentee if he should seek to make it an issue. Even after his patents are established by suits, and another claimed infringer than those against whom the adjudication has gone springs up, the patentee must try out the question with him as to whether or not he is an infringer; and even though it may eventually turn out that he is an infringer, the patentee, upon his suit, will be enjoined in the meantime from interfering with his business, however competitive.

He who may be determined, in a proper suit, to be an infringer, may in the meantime exercise his common right of engaging in business in competition with the patentee: and if his business is interstate business, then the patentee, or others operating under his name, may not put such competitor out of business by unlawful means, whatever their right may be to prevent his intrusion upon the property the patentee has, by excluding the competitor from the field which Congress says may be his alone, if he takes the lawful steps provided for his protection. Until the patentee brings the suits and makes the field his own, there is no way under the patent laws, and the nature of the right given him, by which he can put his competitor engaged in interstate commerce out of business. And if two or more persons, under whatever name or form or method, however subtly [illegible] agree to accomplish by unlawful means that wh[illegible] could accomplish in the way provided by law,

conduct, if directed against the business of the competitors and necessarily directly affecting it, is a conspiracy against trade, and if that trade is interstate trade, it is an offense under the Sherman Anti-Trust Act.

[300] The protection to the monopoly which the patentee may have is the right to bring suits, the result of which will establish his monopoly. This has been said in so many words. In *Hawks* v. *Swett*, 4 Hun. 146, 150, Judges Learned, Boardman, and Potter, in the Third Department of the General Term of the Supreme Court of New York, as existing under the laws obtaining at the time, said—Judge Learned delivering the opinion of the court:

"In order that we should not be misled by any false analogy, it should be noticed that letters patent for an invention confer nothing except a right to bring actions, and thereby to prevent persons from doing what they might otherwise lawfully do."

It is true that the point upon which the case turned was decided the other way in the Court of Appeals (66 N. Y. 206), but the language quoted is not necessarily involved in the grounds given for the reversal of the judgment below. Presiding Judge Learned repeats the language on this subject, used by him in *Hawks* v. *Swett*, in *De Witt* v. *Elmira Mfg. Co.*, 5 Hun (N. Y.) 301, 303. In *Celluloid Mfg. Co.* v. *Goodyear, etc., Co.*, Fed. Cas. No. 2543, Hunt, Circuit Justice, cites *Hawks* v. *Swett* on the same question with approval.

The doctrine asserted in this case for the first time, that the rights of the patentee are of such character that those operating under them may agree, in order to protect them, to engage in acts of unfair competition such as are charged in this case, and even to burn their competitor's factory or destroy the competing—as they believe, infringing—machines, by violence, whenever and wherever found, no matter how much it may affect commerce between the States, carried on by competitors, and be amenable therefor only to the police and to the criminal laws of the locality in which such acts were committed, I am unable to agree with. If a patentee has such power under the patent laws, and Congress under its authority to regulate commerce between the States is powerless to protect interstate commerce actually exist-

ing, it is high time that the patent laws be amended in order to prevent consequences of such shocking character.

Of course, acts of violence by agents of the National Cash Register Company upon agents of its competitors are not immediately involved in the question under discussion, because upon objection by the defendants to the introduction by the Government of testimony tending to show instances of fisticuffs between the agents of the National and the agents of competitors, the testimony was excluded from the consideration of the jury, for the reason, among others, that it might be difficult to determine who was immediately to blame for such occurrences, and it would be wandering from the issues to try incidental issues raised by charges of assault or assault and battery. There was, however, evidence tending to show that one of the National's agents distributed small wires to other agents in his territory for the purpose of their surreptitious introduction into competitors' cash registers, if the customer gave opportunity to the National's agents for close examination of the competitors' cash register in the customer's possession. Aside from that one instance, however, there has been no evidence tending to show actual violence to a competi[301]tor's cash register in the possession of one of its customers. Therefore the argument of counsel for defendants goes further, with that one exception, than the acts of unfair competition the evidence for the Government tends to prove. But the principle is the same, whether the acts of unfair competition were acts of violence upon competitors' cash registers themselves, or acts falling short of actual violence the evidence introduced by the Government tends to show; and counsel's arguments have proceeded upon this basis.

The power of Congress to regulate interstate commerce is complete and supreme. It is lawful to go into the cash register business. Any one may, as a matter of right, go into the cash register business, and make his products the subject of interstate commerce, and may continue to do so until he is restrained by a court of equity, upon the fact being established that he is an infringer; and even after the establishment of such fact, he is amenable only to the court issuing the injunction, or may be subject to the payment of dam-

ages or profits, or both; but he is not, figuratively, an outlaw, to be brought in dead or alive, and his business confiscated by a patentee who is unwilling or afraid to pursue him by lawful methods, and who would destroy his business, interstate though it is, by unlawful means.

The monopoly of which the Government complains, if it should be found to justly complain, is not that which a patentee has built up, however great, however wealthy, however powerful, by the lawful means the patent laws give; but a monopoly of actual trade carried on by competitors actually as a part of interstate commerce, and which equity would protect the competitors in carrying on against unlawful acts of those operating under patents, if they have them, who, by such acts, had grasped a part of the interstate trade in cash registers, which, but for such unlawful acts, would have belonged to such competitors as of lawful right, even though they were infringers, until at least the fact of their infringement had been established by the only means given to a patentee by which he may lawfully exclude infringing competitors.

The conclusion is that the question of the validity or character or importance of the Ritty and Birch patent, or that the Lamson Cash Register Company infringed that patent, is not important, and is irrelevant, except in one aspect presented by it. The charge is that the Lamson Cash Register Company, with others, was compelled to sell out to the National Cash Register Company and go out of business by reason of the acts of the defendants, or some of them, done under a conspiracy to do them, as described in the indictment.

If the Lamson people went out of business for any other reason, then evidence to that effect would be admissible. If by reason of the suit brought against them by the National Cash Register Company they sold out, or if they had knowledge of the character of the Ritty and Birch patent and had knowledge or reason to believe that they were infringers, then the character and importance of that patent, and their knowledge of its character, or the advice they received on the subject, would be admissible as tending to show the ex-

Syllabus.

istence of other reasons for their going out of business than the acts complained of in the indictment.

[302] Thereupon, after some colloquy, the court, addressing counsel for the defendants, said in substance:

"If you can show that the Lamson people knew the character of the Ritty and Birch patent, were advised of it, knew they were infringers, or had reason to know, or were advised by their counsel that they were, or otherwise advised, then this testimony will be permitted to go to the jury only for the purpose of its tendency to show the existence of other reasons impelling the Lamson Company to go out of business than any of the acts complained of in the indictment."

Thereupon, counsel not offering to show anything more than the machine itself, and that, if the witness were permitted to answer, he would say he finds the invention covered by the Ritty and Birch patent in the Lamson machine, the objection of the district attorney to the question was sustained.

PATTERSON ET AL. *v.* UNITED STATES.*

(Circuit Court of Appeals, Sixth Circuit. March 13, 1915.)

[222 Fed. Rep. 599.]

MONOPOLIES 31 — CRIMINAL PROSECUTIONS — INDICTMENT — CONSTRUCTION.—An indictment alleged that during the 20 years prior to the finding thereof many concerns had been engaged in the manufacture and sale of cash registers, a list of such concerns, so far as known to the grand jurors, being therein set out; that defendants, the officers and agents of the N. Company, conspired to restrain the interstate trade and commerce carried on by such concerns other than the N. Company by unfair means, which wrongfully and irresistibly excluded others from engaging in such trade and commerce; that, intending to restrain the interstate commerce so carried on by such concerns and compel them either to go out of business or sell their business and instrumentalities for carrying it on to the N. Company, so that it could, as in most cases it did, discontinue

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* For opinion of District Court overruling demurrer to indictment (201 Fed. 697), see *ante*, page 1.

For opinion on the patent question (205 Fed. 292), see *ante*, page [illegible].

[illegible] certiorari denied (238 U. S. 635), June 14, [illegible]

Syllabus.

the business and the use of such instrumentalities, and thereby eliminate competition, they conspired to accomplish their objects by the means therein specified. *Held*, that it was not the intention of the indictment to allege that each of the competitors of the N. Company named was in existence during the entire 20 years preceding the indictment, nor to disclose when any of them were in existence, but only to allege that during such period there was no time when one or more of such competitors were not in existence.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31 — CRIMINAL PROSECUTIONS — INDICTMENT — CONSTRUCTION.—An indictment alleged that many concerns had been engaged in the manufacture and sale of cash registers, a list of which, so far as known, was therein set out; that certain officers and agents of the N. Company had conspired in restraint of the interstate trade and commerce carried on by the several concerns thereinbefore named other than the N. Company; and that, intending to restrict and restrain the interstate commerce so carried on by "said concerns," and to compel them to go out of business or sell their business and instrumentalities to the N. Company they had conspired to accomplish the object specified by the means therein set out, alleged to have been directed against "said concerns," "such concerns," etc. *Held*, that the indictment did not charge a general conspiracy against all competitors, but only a conspiracy against those therein named.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

INDICTMENT AND INFORMATION 125—DUPLICITY—INDICTMENTS FOR CONSPIRACY.—Though such indictment charged only a conspiracy against the competitors therein named, and though it did not allege that all of such competitors were in existence during all of the time to which it referred, it was not duplicitous as charging a separate conspiracy against each competitor, as its underlying thought was that there was a generic conspiracy against all competitors, which took specific direction against those named as they came into existence, and continued against them as long as they remained in existence, and therefore it charged a single conspiracy.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. 125.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—INDICTMENT—CERTAINTY.—Though under such indictment a conviction could be had only in so far as the conspiracy charged existed within the period of limitation and [600] as to the competitors in existence within such period, the allegations as to its prior existence and its existence against competitors who had ceased to exist more than three years

Syllabus.

before the finding of the indictment being merely descriptive, it was not void for uncertainty for failure to allege which of the competitors were in existence within the three years.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31 — CRIMINAL PROSECUTIONS — INDICTMENT — SUFFICIENCY.—An indictment for conspiring to restrain the interstate commerce of defendants' competitors in cash registers alleged, concerning the competitors therein named, that they had sold the greater portion of the cash registers manufactured by them to users and dealers whose several places of business were situated in States other than those wherein the cash registers were manufactured by such concerns, respectively, and had consigned for sale other cash registers to dealers and to their own agents in such other States; that they had been shipping such cash registers to such users, dealers, and agents in such other States; and that in doing so each of such competitors had been engaged in trade and commerce among the several States. *Held*, that this sufficiently showed that the trade and commerce in which defendants' competitors were engaged was interstate.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 12—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.—Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820), declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations covers only contracts, combinations, and conspiracies which are unreasonably in restraint of interstate trade or commerce, though possibly every conspiracy is unreasonably in restraint thereof, on the theory that there can be no reasonable conspiracy, or conspiracy to do a reasonable thing.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.—Act July 2, 1890, § 1, relative to combinations and conspiracies in restraint of interstate commerce, includes conspiracies between competitors, or between the officers and agents of one competitor, on its behalf, against another competitor, and also includes conspiracies between any persons against any other person.

[Ed. Note.—For other cases see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.—To bring a conspiracy within act July 2, 1890, § 1, it is not essential that its execution be of any benefit to the conspirators; it being sufficient that it will be in restraint of another's interstate trade or commerce.

[Ed. Note.—For other cases see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

Syllabus.

MONOPOLIES 16, 17—STATUTORY PROVISIONS—CONSPIRACIES FORBIDDEN.—Under act July 2, 1890, § 1, relative to conspiracies in restraint of interstate commerce, the extent of the interstate trade or commerce conspired against is immaterial, and a conspiracy between the officers and agents of one competitor on its behalf to restrain a single interstate sale or shipment by another competitor is covered by it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 12, 13; Dec. Dig. 16, 17.]

[601] MONOPOLIES 17—STATUTORY PROVISIONS—CONSTRUCTION—"MONOPOLIZE."—Within act July 2, 1890, c. 647, § 2, 26 Stat. 209 (Comp. St. 1913, § 8821), making it illegal to monopolize, attempt to monopolize, or combine or conspire to monopolize, any part of the trade of commerce among the several States, there can be no monopolizing in making a single interstate sale, or a great number of such sales, even though wrongful means are used in making them, and a wrong of some other nature is done competitors, since to "monopolize" in a legal and accurate sense is to exclude other persons, though not necessarily all persons, and there can be no monopolizing with respect to a sale which in the nature of things can be made by but one competitor, and in which there can be no common occupation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 13—STATUTORY PROVISIONS—CONSTRUCTION.—A monopolizing of interstate trade and commerce by efficiency in producing and marketing a better and cheaper article than anyone else is not within act July 2, 1890, § 2.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. 13.]

MONOPOLIES 12—STATUTORY PROVISIONS—CONSTRUCTION.—A combination of competitors, accompanied by an exclusion of outsiders from interstate trade and commerce, or the exclusion by a competitor, or its officers and agents on its behalf, of other competitors, by the use of wrongful means, constitutes a monopolizing of such commerce within act July 2, 1890, § 2.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 17—STATUTORY PROVISIONS—CONSTRUCTION.—While but one competitor can make a sale, and though there can be no monopolizing within act July 2, 1890, § 2, in making a single interstate sale, or a great number of sales, though wrongful means are used in making them, one competitor monopolizes interstate trade and commerce by excluding all or substantially all other competitors from the free opportunity of approaching each and every prospective purchaser on equal terms, or by driving them from the field of freely offering their goods, so as to have that field to himself.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

Syllabus.

MONOPOLIES 17—STATUTORY PROVISIONS—CONSTRUCTION—"ANY PART OF INTERSTATE TRADE OR COMMERCE."—Within act July 2, 1890, § 2, prohibiting the monopolizing of any part of the trade or commerce among the several States, "any part of interstate trade or commerce" embraces the interstate trade or commerce of all prospective purchasers of a particular commodity in the United States, or in some particular portion thereof, but excludes the interstate trade or commerce of a particular prospective purchaser of a particular commodity.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

INDICTMENT AND INFORMATION 125—DUPLICITY—MONOPOLIES—"MONOPOLIZED."—An indictment in the first count charged a conspiracy by the officers and agents of the N. Company in restraint of the interstate commerce of its competitors therein named in the cash register business during 20 years, and alleged that during such period the N. Company had done from approximately 80 per cent early in the period to approximately 90 per cent at the latter end thereof, of the business of manufacturing cash [602] registers, and that such officers and agents had conspired to accomplish their objects by the unlawful means therein specified. The second count charged that such officers and agents under the circumstances and by the means set forth in the first count had, by drawing to the N. Company, monopolized a part of the trade which otherwise would have been secured or retained by its competitors, and it made a part thereof the allegations of the first count descriptive of such trade and commerce, the concerns engaged therein, the means employed, and the knowledge, intent, and acts of the defendants. *Held*, that, while "monopolized," in the light of the context, meant "secured," the indictment charged defendants with monopolizing interstate commerce in cash registers, and not merely with monopolizing a part of such interstate commerce, and hence charged but a single offense, and was not duplititious, as the offense of "monopolizing" consists, not only in obtaining or securing a monopoly by wrongful acts, but in holding and maintaining it by such acts, and it appeared from the indictment that the N. Company had a practical monopoly, and that the wrongful means specified were employed to maintain and hold such monopoly.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 384-400; Dec. Dig. 125.]

INDICTMENT AND INFORMATION 59—SUFFICIENCY OF ACCUSATION.—An offense intended to be charged in an indictment need not be charged expressly in general terms; it being sufficient if the facts alleged, if true, show the commission of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 180, 181; Dec. Dig. 59.]

Syllabus.

MONOPOLIES 31—CRIMINAL PROSECUTIONS—INDICTMENT—CERTAINTY.—Where the first count of an indictment charging the officers and agents of the N. Company with conspiring to restrain the interstate commerce of the N. Company's competitors alleged that during 20 years many concerns had been engaged in a particular business, a list of such concerns, so far as known, being therein set out, without, however, alleging that all of the concerns named were in business during the entire 20 years, or alleging when any of them were so engaged in business, a count charging the defendants with monopolizing the trade which, but for their wrongful acts, would have been secured or retained by the concerns "mentioned" in the first count as having carried on business during the three-year period of limitation, and another count alleging that such defendants, having drawn to the N. Company by the means "mentioned" in the first count that part of the interstate trade in cash registers which otherwise would have been secured or retained by the concerns mentioned in the first count as having carried on business before the period of three years, continued to hold and carry on its interstate business augmented by such wrongful means, and thereby monopolized interstate trade in cash registers, were void for uncertainty; the first count having "mentioned" no concerns as carrying on business within three years or before three years.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 29, 31—CRIMINAL PROSECUTIONS—SUFFICIENCY OF INDICTMENT.—A patentee and its officers and agents were not guilty of monopolizing interstate trade and commerce in cash registers, in holding such trade and commerce after securing it by wrongful means, if such trade and commerce was covered by its patents; and hence, where an indictment charging that the officers and agents of the patentee, having by wrongful means drawn to the patentee interstate trade and commerce which its competitors would otherwise have secured, continued to hold, conduct, and carry on its interstate business augmented by such wrongful means, and thereby monopolized interstate trade and commerce in cash registers, was de- [602] fective, where, though it showed that some at least of the patentee's patents had not expired, it did not allege that the trade and commerce so secured and held was not covered by those patents.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 19, 20; Dec. Dig. 29, 31.]

MONOPOLIES 29, 31—STATUTORY PROVISIONS—CONSTRUCTION.—A party monopolizing interstate commerce by employing wrongful means to drive its competitors from the field does not continue to monopolize such commerce, with act July 2, 1890, § 2, by holding the business so secured after its competitors have ceased to compete; and hence an indictment charging a monopolizing within the period of

Syllabus.

limitations by holding the business previously obtained by such wrongful means was insufficient, where it did not allege the doing of anything to maintain and hold the monopoly during such period.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 19, 20; Dec. Dig. 29, 31.]

INDICTMENT AND INFORMATION 99—ALLEGATIONS AS TO VENUE—REFERENCE TO OTHER COUNTS.—Where the first count in an indictment charged a conspiracy to restrain the interstate commerce of defendants' competitors, another count, alleging that defendants, having by the means and under the circumstances and conditions described in the first count drawn to their company a part of the interstate commerce in cash registers which otherwise would have been secured or retained by its competitors, continued to carry on the interstate business of their company so augmented, and thereby monopolized interstate commerce in cash registers, did not make the allegations of the first count as to venue a part thereof.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. 99.]

CRIMINAL LAW 101—VENUE—STATUTORY PROVISIONS.—Judicial Code (act March 3, 1911, c. 231) § 100, 36 Stat. 1121 (Comp. St. 1913, § 1087), dividing the Southern District of Ohio into two divisions and providing that certain terms of the district court for the Western Division shall be held at Cincinnati and certain terms for the Eastern Division at Columbus, and that terms for the Southern District shall be held at Dayton on dates specified, that prosecutions for crimes and offenses committed in any part of the district shall be cognizable at the terms held at Dayton, and that all suits within either division may be instituted, tried, and determined at such terms, does not require that prosecutions shall be instituted at Dayton, nor that prosecutions instituted at Cincinnati or Columbus shall be transferred to Dayton for trial, and on a trial of the officers and agents of the N. Company, having its plant and principal office at Dayton, where a number of the defendants resided, it was not error to refuse to transfer the case from Cincinnati to Dayton for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 199-205; Dec. Dig. 101.]

CRIMINAL LAW 149—LIMITATION OF PROSECUTIONS—CONSPIRACIES.—Under an indictment charging the officers and agents of the N. Company with conspiring to restrain the interstate business of the N. Company's competitors, which proceeded on the theory that there was a generic conspiracy extending over 20 years against all competitors, which as the various competitors named in the indictment came into existence was directed against them specifically, a conviction could be had only for conspiring in restraint of the trade or commerce of such of the competitors named in the indictment as were in existence during the three years prior to the finding of the indictment, and there could be no conviction for conspiring against

Syllabus.

the competitors who ceased to exist more [604] than three years prior to the finding of the indictment, or for the generic conspiracy so far as it existed prior to the three years.

[Ed. Note.—For other cases, see Criminal Law, Cent Dig. §§ 273–275; Dec. Dig. 149.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—On a trial of the officers and agents of the N. Company for conspiring to restrain the interstate trade of the A. Company by making to such company and purchasers and prospective purchasers from it threats of infringement suits and by other means, the fact that the N. Company was successful in the lower court in a suit for infringement was at least prima facie evidence of probable cause, though the decree was reversed on appeal.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—On such trial the mere fact that there was a conspiracy or joint purpose on the part of the defendants to restrain the trade of competitors of the H. Company, which ceased to exist before the A. Company was organized, by the use of certain unlawful means, was no evidence that they had such joint purpose as to the A. Company, when during the five years of its existence preceding the indictment there was no manifestation of such purpose.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—Though under an indictment charging the officers and agents of the N. Company with conspiring to restrain the interstate business of such company's competitors, which proceeded on the theory that there was a generic conspiracy against all competitors extending over a period of 20 years, which as the various competitors named in the indictment came into existence was directed against them, there was evidence to make a question for the jury as to a conspiracy within the period of limitations only as against the A. Company, and only with respect to certain of the means of accomplishing the objects of the conspiracy set forth in the indictment, evidence that the defendants were parties to a generic conspiracy of the character mentioned, and that they conspired in restraint of competitors named who ceased to exist before the A. Company was organized, by the use of means other than those shown to have been employed against the A. Company within the period of limitations, was admissible as bearing on the question whether there was a conspiracy against the A. Company when it came into existence, which continued into the period of limitations.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—Where such indictment alleged that to accomplish the objects of the con-

Syllabus.

spiracy defendants induced, hired, and bribed employés of the N. Company's competitors to disclose the secrets of such competitors' business, and hired and bribed employés of carriers, etc., to disclose the secrets of their employers relative to the transportation of cash registers for such competitors, and instructed and required the N. Company's sales agents to ascertain and report all facts pertaining to the business of such competitors, though these acts were not calculated in themselves to restrain the trade or commerce of any competitor, their sole function being to enable defendants to use other means calculated to restrain such trade, evidence to show that the conspiracy included such means was admissible, and to be considered by the jury as bearing on the further question **[605]** whether the conspiracy also included effective means of restraining such trade and commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

CRIMINAL LAW 150—LIMITATION OF PROSECUTIONS—"CONSPIRACY."—Where a conspiracy was in existence more than three years prior to the finding of the indictment, and continued into such period of limitation, it was not absolutely essential to support a conviction therefor that anything should be done in furtherance of the conspiracy within the three years, since a conspiracy is not merely an agreement to do an unlawful thing, or a lawful thing by unlawful means, but is initiated by the agreement, and, accurately defined, is a partnership in criminal purposes brought about by an agreement, and so long as the partnership continues the conspiracy continues, whether anything is done in furtherance of it or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. 150.

For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

MONOPOLIES 29—CRIMINAL CONSPIRACIES—PATENTS.—Those officers and agents of a company manufacturing and selling cash registers having nothing to do with competition, as, for instance, those in the manufacturing department, could not be said to be parties to a conspiracy on the part of its officers and agents to restrain and destroy the interstate trade of its competitors.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. 29.]

CONSPIRACIES 40—CRIMINAL OFFENSES—PARTIES.—It was not sufficient to make persons parties to a conspiracy that they knew of it, or acquiesced in it, if they did not by word or deed become a party to it.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 73, 75-78; Dec. Dig. 40.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—On a trial for [con]spiring in restraint of interstate commerce, evidence *held* to [b]e a question for the jury as to whether there was a conspiracy

Syllabus.

extending over a great many years on the part of such officers and agents of a corporation as had to do with competition to restrain and destroy the interstate trade of such company's competitors, whether such conspiracy was by the use of certain of the means specified in the indictment directed against the A. Company when it came into existence, and whether the conspiracy continued against it into the period of three years preceding the finding of the indictment.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

CRIMINAL LAW 1158—REVIEW—QUESTIONS OF FACT.—It is not the province of an appellate court to weigh the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066, 3070, 3071, 3074; Dec. Dig. 1158.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—Where there was substantial evidence that the officers and agents of the N. Company were in a conspiracy to restrain the interstate trade of a competitor by causing certain wrongful acts to be done, and the question was whether such conspiracy had continued into the period of three years preceding the indictment, evidence as to the doing of such acts within such period in the regular course of the business of the N. Company by sales agents and salesmen of that company who were under the direct supervision of certain of the parties to the conspiracy was not **[606]** inadmissible on the ground that the defendants were not shown to have had any connection therewith; it being for the jury to determine whether these acts were accounted for by the continued existence of the conspiracy, and this was not the drawing of one inference from another.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—On the trial of the officers and agents of the N. Company for conspiring in restraint of the interstate trade of the A. Company, competing with the N. Company in the sale of cash registers, there was evidence that a machine sold by the A. Company was out of order, that the agent of that company made repeated attempts to fix it, and that after he quit the employ of that company a piece of the mechanism was found to be bent, and it was the Government's position that the agent bent it at the instance of the N. Company. *Held*, that evidence that when he left the employ of the A. Company several months afterwards he entered the employ of the N. Company, and that a few weeks before he did so one of the N. Company's competition men was seen in his store, did not sufficiently connect the N. Company with the defective condition of the machine to render this evidence admissible.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

Syllabus.

Monopolies 31—Criminal Prosecutions—Evidence.—On the trial of the officers and agents of the N. Company for conspiring in restraint of the interstate trade of their competitors, evidence that a salesman of the N. Company attempted to induce a dealer who bought cash registers from a competitor and resold them to discontinue the business by threats of interference, and evidence of a similar transaction more than three years prior to the indictment, did not make a question for the jury as to a conspiracy with respect to the business of that competitor.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

Monopolies 31—Criminal Prosecutions—Evidence.—On a trial of the officers and agents of the N. Company under an indictment charging a conspiracy in restraint of the interstate trade of the N. Company's competitors, directed against the various competitors as they came into existence, on which it was claimed that the conspiracy had existed within the period of limitations as against the A. Company, evidence as to acts directed against other competitors within the three years, but not sufficiently tending to establish a conspiracy against them to make a question for the jury, did not tend to establish a conspiracy against the A. Company, and should not have been admitted.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

Monopolies 31—Criminal Prosecutions—Evidence.—On such trial, though there was a question for the jury only as to the conspiracy charged within the period of limitations as against the A. Company, evidence as to acts directed against other competitors tending to show a generic conspiracy against all competitors, and bearing on its fixed and absolute character and on its nature otherwise, was admissible, though relating in some instances to matters occurring in the early part of the 20 years during which the conspiracy was claimed to have existed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

Monopolies 31—Criminal Prosecutions—Evidence.—Under an indictment charging a generic conspiracy on the part of the officers and agents of the N. Company engaged in manufacturing and [607] selling cash registers, in restraint of the interstate trade of all competitors of the N. Company, sought to be carried out by the means therein specified, though the only question for the jury under the evidence was whether such conspiracy within the period of limitations was directed against the A. Company by the use of certain of the means specified, evidence as to the use of other means not specified in the indictment against other competitors, who ceased to exist before the competitor in question was organized, was admissible to establish that the generic conspiracy was to use

Syllabus.

every possible wrongful means that might be effective in putting an end to competition.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE. On such trial, evidence as to the purchase by the N. Company of the business of other competitors prior to the organization of the A. Company, and how such purchases came about, and the contracts of purchase, were admissible as tending to establish a conspiracy to compel competitors to sell out to the N. Company by the use of any effective wrongful means, and thereby to establish a specific conspiracy against the A. Company to restrain its trade and commerce by other means, if not to compel it to sell out to the N. Company, though at the time of the purchase of the business of such competitors suits for patent infringement were pending against most of them, the evidence tending to show that the suits were not brought in good faith, and that in some of the cases the use of other wrongful means, and not the bringing of the suit, was the real cause of the competitors selling out, and it also appearing that the contracts of purchase prohibited them from engaging in the same business for 20 or 25 years, except in certain States where the business was not large.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—On such trial contracts with dealers in cash registers, who were mainly dealers in second-hand registers, eliminating them from the cash-register field, was admissible as evidencing a purpose to acquire complete control of the business in second-hand cash registers of the N. Company's make, and to show a generic conspiracy and its character, though they were not referred to in the indictment.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

CRIMINAL LAW 695—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS AND EXCEPTIONS.—On the trial of the officers and agents of the N. Company for conspiracy, though an objection to alleged minutes of the proceedings of conventions of the district managers of such company, on the ground that they were hearsay, raised the objection that before the minutes were read their accuracy should be guaranteed by the persons who made them, or by others who were present at the conventions, the objection should have been more specific, as such guaranty might have been furnished, and no error was committed in admitting the minutes over the objection made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. 695.]

MONOPOLIES 31—STATUTORY PROVISIONS—CONSPIRACIES PROHIBITED.—Under act July 2, 1890, §1, prohibiting conspiracies in restraint of

Syllabus.

trade or commerce among the several States, a patentee, its officers, and agents may not conspire in restraint of the interstate trade or commerce of a competitor in the articles covered by its patent, though the competitor's business is an infringement of its patent; and hence, on the trial of the officers and agents of a company for conspiring in restraint of the [608] interstate trade of a competitor, evidence that such company held patents covering the machines made and sold by the competitor was not admissible.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

PATENTS 191—RIGHTS OF PATENTEE.—A patentee has the common-law right to make, use, or sell the article patented, and the statutory right to exclude or prevent others from making, using, or selling it and to have others refrain therefrom.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 268; Dec. Dig. 191.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—On a trial of the officers and agents of the N. Company under an indictment charging them with conspiring in restraint of the interstate trade of the N. Company's competitors, by the use of various wrongful means, under which there was a question for the jury as to whether such conspiracy within the period of limitations was directed against the A. Company by the use of certain of such means other than the bringing in bad faith of patent infringement suits, and evidence was admitted as bearing on the existence of a generic conspiracy against all competitors as to the bringing of such suits against competitors other than the A. Company to compel them to sell out or quit the business, which suits were terminated without a decision of the question of infringement by sales of the competitors' business to the N. Company, evidence that the N. Company held valid patents covering the business of such competitors was admissible, since, if there was real cause for bringing the suits, they were not brought in bad faith.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—EVIDENCE.—On such trial, evidence as to competitive tactics and aggressions on the part of the N. Company's competitors was admissible, as tending to show that the conspiracy against them was due to provocation, and that, there having been no provocation on the part of the A. Company, the conspiracy was never directed against it.

[Ed. Note.—For other cases see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

CRIMINAL LAW 363—RES GESTÆ—LETTERS.—On the trial of the officers and agents of the N. Company for conspiring in restraint of the interstate trade of the N. Company's competitors, where a letter written by such company's vice president and manager to district

Syllabus.

managers about the time a quo warranto proceeding was instituted against the company for violating the anti-trust laws of a State, in which he stated that it was the policy of the company in no case to permit agents to misrepresent cash registers manufactured by other companies, or to induce any purchaser of a cash register made by any other company to break his contract, was in evidence, defendants should have been permitted to introduce as a part of the res gestæ the answers thereto by certain district managers, stating that such policy had been pursued in their districts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. 363.]

CRIMINAL LAW 772—INSTRUCTIONS—LIMITATIONS.—On a trial under an indictment charging a conspiracy extending over a great many years against competitors of the N. Company, and directed against the various competitors of such company as they came into existence, though the court charged that defendants could not be found guilty unless they had conspired within three years prior to the indictment, defendants were entitled to specific instructions that they **[609]** could not be found guilty for conspiring against competitors who ceased to exist before the period of limitations.

[Ed. Note.—For other cases, see Crimnal Law, Cent. Dig. §§ 1812–1814, 1816, 1817; Dec. Dig. 772.]

CRIMINAL LAW 814, 1172—QUESTIONS FOR JURY—FAILURE OF PROOF.—On a trial for conspiring in restraint of the interstate trade of competitors of a company by the use of various means specified in the indictment, it was reversible error to submit to the jury the question whether the conspiracy included means of which there was no evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987, 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. 814, 1172.]

MONOPOLIES 17—CONSPIRACIES IN RESTRAINT OF TRADE—UNLAWFUL ACTS.—It was not unlawful for the officers and agents of a company manufacturing and selling cash registers to compare by comparative demonstrations or otherwise competitive cash registers with their cash registers, for the purpose of demonstrating the superiority of their register, and thereby induce prospective purchasers to buy it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 17—CONSPIRACIES IN RESTRAINT OF TRADE—UNLAWFUL ACTS.—It was unlawful for the officers and agents of the N. Company, engaged in manufacturing and selling cash registers, to sell or offer and try to sell the N. Company's cash registers to persons who had bought and owned competing cash registers, if this involved the purchaser breaking his contract with the competitor in any particular, or was done for the purpose of driving the competitor from

the field; and on a trial for conspiring in restraint of the interstate trade of competitors, an instruction that it was not unlawful for such officers and agents to sell or offer and try to sell cash registers to persons who owned competing registers in exchange at such price as was satisfactory to the parties needed qualification, and was properly refused.

[Ed. Note.—For other cases see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 17—CONSPIRACIES IN RESTRAINT OF TRADE—UNLAWFUL ACTS.—Whether it was unlawful for the officers and agents of the N. Company, engaged in manufacturing and selling cash registers, to require the agents of that company to report the names of persons who had purchased cash registers from competitors, or to secure samples of machines put on the market from competitors, depended on the manner in which the information or samples were obtained or secured; and on a trial for conspiring in restraint of the interstate trade and commerce of competitors of the N. Company, an instruction that it was not unlawful to so require was too broad, and was properly refused.

[Ed. Note.—For other cases see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

John H. Patterson and others were convicted of offenses, and they bring error. Reversed and remanded.

For opinion on demurrer to indictment, see 201 Fed. 697. See, also, 205 Fed. 292.

This is a criminal prosecution under act July 2, 1890, 26 Stat. 209, c. 647. The indictment was found February 22, 1912, and contains three counts. The [610] offense which the first charges is that of engaging in a conspiracy in restraint of interstate trade and commerce under the first section of the act, and that which each of the other two charges is monopolizing a part of such trade and commerce under the second section. The defendants were 30 in number. Each, for many years, had been connected with the National Cash Register Company, a corporation engaged in the business of manufacturing and selling cash registers, with its principal place of business at Dayton, Ohio, within the district of the ...er court, in the capacity of an officer or agent. All but ... so connected when the indictment was found; those

four ceased their connection, three in 1910 and one in 1911; and four of them had been connected for at least 20 years continuously prior to its finding. The conspiracy with which they were charged was directed against competitors of that company, and the monopolizing was the exclusion of its competitors from such trade and commerce for its benefit. Trial was had, and all the defendants save one were found guilty under each count. Motion for new trial was sustained as to one, and the indictment was nollied as to him. Sentence as to another was deferred because of sickness, and pronounced as to the other 27, who are the plaintiffs in error herein. The sentence of one, John H. Patterson, president, was a fine of $5,000 and confinement in jail for one year; that of 23, such confinement for one year; and that of 3 for nine months. The trial lasted nearly three months, and 393 errors have been assigned. They bring up, so far as relied on, rulings adverse to defendants on demurrer to each count, on motion that the trial be had at Dayton, instead of Cincinnati, where the indictment was found, on the admissibility of evidence, some of which was admitted and some excluded, on motion to direct a verdict for defendants, and on requests to charge the jury.

The first count is quite long; each of the other two is short. The first makes certain introductory statements before charging the offense and alleging the facts, the doing of which it claimed constituted its commission. Those statements are:

(1) That "throughout the 20 years last past" inventors and manufacturers have invented and put upon the market cash registers; numerous patents, during said 20 years, having been issued to inventors, some basic and some for improvements, most of the former and many of the latter having expired long before the three years immediately preceding the finding of the indictment, and the number being so great as to prevent detailed description thereof and of the various inventions covered by them being set forth.

(2) That "during the said 20 years many concerns have been engaged, in the manner and under the circumstances

hereafter set forth, and in competition with each other, except as hereinafter shown, in the manufacture and sale, directly and indirectly, under letters patent and otherwise, of such cash registers, and that a list of the names of such of said concerns as are known to said grand jurors, showing their respective places of manufacture, so far as known to said grand jurors, is as follows, to wit." The list contains the names of 33 different concerns, including the National Cash Register Company, and is found in the margin.[a]

[611] (3) That "of the total amount of manufacturing of such cash registers done by all of said concerns during said 20 years the National Cash Register Company has done from approximately 80 per cent early in said period to approximately 95 per cent at the latter end thereof."

(4) That "said concerns during said 20 years have also, respectively, sold the greater portion of their cash registers so manufactured by them, some to users of and some to

[a] The National Cash Register Company, a corporation, Dayton, Ohio; the American Cash Register Company, Columbus, Ohio; the Michigan Cash Register Company, Detroit, Mich.; the Peninsular Cash Register Company, Detroit, Mich.; the Dial Cash Register Company, Milwaukee, Wis.; the St. Louis Cash Register Company, St. Louis, Mo.; American Cash Register Company, Philadelphia, Pa.; the Bensinger Cash Register Company, Chicago, Ill.; the Boston Cash Register Company, Northampton, Mass.; the Bundy Cash Register Company, Binghamton, N. Y.; the Burdick-Corbin Company, Detroit, Mich.; the Century Cash Register Company, Detroit, Mich.; the Chicago Cash Register Company, Chicago, Ill.; the Cuckoo Cash Register Company, Detroit, Mich.; the Globe Cash Register Company, Detroit, Mich.; the Hallwood Cash Register Company, Columbus, Ohio; the International Company, Columbus, Ohio; Hopkins & Robinson, Louisville, Ky.; Hubinger-Carroll Company, New Haven, Conn.; the Ideal Cash Register Company, Bound Brook, N. J.; the Jewell Cash Register Company, Detroit, Mich.; the Kruse Cash Register Company, New York, N. Y.; the Lamson Cash Register Company, Lowell, Mass.; the Latimer Cash Register Company, Detroit, Mich.; the Metropolitan Cash Register Company, New York, N. Y.; the Navy Cash Register Company, Chicago, Ill.; the Osborn Cash Register Company, Detroit, Mich.; the Standard Cash Register Company, Orange, N. J.; the Sun Cash Register Company, Columbus, Ohio; the Toledo Cash Register Company, Toledo, Ohio; the Union Cash Register Company, Trenton, N. J.; the Weiler Cash Register Company, Detroit, Mich.

Statement of the Case.

dealers in such cash registers, whose several places of use and business have been situated in all the other States of the United States than those wherein such cash registers have been so manufactured by said concerns, respectively, and have consigned for sale other such cash registers to such dealers, and to their own agents in such other States; that in pursuance of such sales and upon such consignments said concerns have, respectively, been continually shipping such cash registers to such users, dealers, and agents in such other States, the number of such users, agents, and dealers being so great as to make it impracticable, if not impossible, to set forth a list of them in this indictment; * * * and that in and by so manufacturing, selling, consigning, and shipping such cash registers into other States than the State of manufacture each of said concerns has been engaged in trade and commerce among the several States of the United States, within the meaning of the act of Congress approved July 2, 1890."

(5) And that the National Cash Register Company "has had certain persons for its principal officers and agents, each of whom has been actively engaged in the management of the business and affairs of said the National Cash Register Company under its authority and to the full extent of his authority as such officer and agent; and that a list of said persons as are known to said grand jurors, showing so far as known to said grand jurors the character of their several offices and agencies and the time of their becoming such officers and agents, respectively, and, in case they have ceased to become such officers and agents, the time when they so ceased to become such officers and agents, is as follows, to wit," which list contains the names of 137 persons, including those of the 30 defendants.

These introductory statements were followed by a charge of the offense in general terms. It is alleged that the defendants, "being, as said grand jurors * * * charge they have been, the persons who have, by virtue of their being such officers and agents of said the National Cash Register Company, controlled and directed the business and affairs of said the National Cash Register Company unlawfully have, continuously and at all times from the days when,

as in this count above set forth, they, respectively, became officers and agents of said the National Cash Register Company to the day of the finding and presentation of this indictment, or to the days when they ceased to be such officers and agents in cases where they did so cease to be such officers and agents at and within said Western Division of said Southern District of Ohio, knowingly engaged and consciously participated in a corrupt conspiracy in undue, unreasonable, * * * restraint of said interstate trade and commerce so as aforesaid, during such times, carried on by the several concerns in this count above named other than said the National Cash Register Company—each of said defendants then and there well knowing, as he then and there did know, all the premises in this indictment aforesaid; that is to say, a conspiracy to restrain, and which during and throughout such times has in fact restrained, said last-mentioned trade and commerce by divers unfair * * * means which, consideration being given to the advantage over said other concerns held by said the National Cash Register Company in consequence of its resources being, as they were, so great as compared with those of such other concerns, respectively, have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce, none of which has been justified or warranted by any letters patent."

From this charge in "generic terms" the count descended to "particulars." It characterized the particular allegation which followed as a "description" of the "conspiracy and means" thereby charged. In strictness it was an allegation of facts the doing of which it was claimed constituted the offense charged generally. The allegation was that, "intending to obstruct, restrict, and restrain the free flow of said interstate commerce so carried on by said concerns other than the National Cash Register Company, and compel those [612] concerns either to go out of business or to sell and transfer their business and facilities and instrumentalities for carrying it on to said the National Cash Register Company, so that said the National Cash Register Company could, as in most cases it in fact did, discontinue the business and the use of the facilities and instrumentalities so acquired by it, and thereby effectually and inevitably to eliminate and

prevent all competition of such other concerns with said the National Cash Register Company (all of such other concerns being hereafter referred to as competitors), said defendants in their several capacities as such officers and agents of said the National Cash Register Company have by concerted and continuous endeavor carried on the business and affairs of said the National Cash Register Company upon a plan involving" 11 different things, which the count then proceeded to set forth in considerable detail. This allegation has been treated as the equivalent of an allegation that the defendants, whilst such officers and agents, conspired to accomplish the objects thus set forth by means of those 11 things, and we so accept it. The 11 things by means of which the defendants conspired to accomplish those objects may thus be summarized:

(1) Inducing, hiring, and bribing employees of the competitors of the National Cash Register Company, named, to disclose to it the secrets of their business, particularly as to prospective buyers, customers who had ordered, customers who had not fully paid, shipments to customers, agents, and dealers, volume of business, places where done, inventions, financial conditions, and connections.

(2) Inducing, hiring, and bribing employees of carters, truckmen, express companies, railroad companies, and telephone and telegraph companies to disclose to it the secrets of their employers pertaining to the carriage and transportation of the cash registers of such competitors.

(3) Instructing and requiring all its sales agents to ascertain and report all facts and details pertaining to the business of such competitors, and particularly of competitors coming into the competitive field.

(4) Using its influence and that of its agents with, and the making of unwarranted and false statements to, banking and other institutions, to injure the credit of such competitors, and prevent them from securing accommodation of money, credit, and supplies.

(5) First. Instructing and requiring all its sales agents to interfere with, obstruct, and prevent, in every way possible, sales of such competitive cash registers by such competitors, and their agents and dealers in cash registers, and by any

and all means to bring about sales of its cash registers, and the displacement of such competitive cash registers, and the substitution of its genuine cash registers therefor in the hands of users of cash registers, and particularly (*a*) by making to prospective purchasers of such competitive cash registers false statements derogatory of same, and reflecting injuriously upon the business character and financial credit of such competitors, and their ability and intention to perform their undertakings and make good their warranties and promises, and offering to sell to them cash registers at prices much less than the regular and standard prices and on unusually favorable terms as to payment; (*b*) by inducing persons who had already ordered such competitive cash registers to cancel their orders and purchase its cash registers through such statements and offers; (*c*) by inducing purchasers of such competitive cash registers who had only partially paid therefor to repudiate their contracts of purchase through such statements and offers and allowing them the amount they had paid; (*d*) by inducing purchasers of such registers, whether they had paid in full or not, to surrender them to it, in exchange for its registers for the purpose of exhibiting them in the windows of its stores where its registers were on sale, bearing placards with the word "Junk" or "For Sale at Thirty Cents on the Dollar" printed thereon; (*e*) by offering, to prospective purchasers of such registers, registers in similitude of any competitive registers they were contemplating buying, at a price much lower than the regular price thereof, and in cases at much less than the manufacturer's cost, which registers so offered were manufactured by it solely as a so-called "knocker," so as to cause such purchasers to believe that it was of such cheap and poor construction that it was a waste of money to purchase it or such registers; (*f*) and by offering to prospective purchasers of such **[613]** registers such knockers with weak and defective mechanism, and claiming that the registers they were contemplating buying had the same weak and defective mechanism. Second. And instructing and requiring its sales agents secretly to weaken and injure the interior mechanism, and remove and destroy parts of such mechanism of the cash registers of such competitors in

actual use by purchasers, and thereby to cause them to become dissatisfied and substitute for them its cash registers.

(6) Making by it to such competitors and to purchasers and prospective purchasers of their cash registers of threats to begin suits in the courts against them for infringing and having infringed its patent rights pertaining to its cash registers, when, as each of them well knew, no such patent rights existed, and no such suit was contemplated or would really be begun, and such threats were made merely to harass such competitors, purchasers, and prospective purchasers, and deter such competitors from manufacturing and selling such competitive cash registers in such interstate trade and commerce and such prospective purchasers from buying and using such competitive cash registers.

(7) Beginning, in other cases, by it against such competitors and against purchasers of such competitive cash registers of suits for infringement of its patent rights pertaining to its cash registers, when, in those cases, they each well knew no patents upon which such suits could be maintained were in existence or owned or controlled by it, and when, as they each well knew, none of those suits would be further pressed, but all such suits would be kept pending only as long as they served the purpose of harassing such competitors and purchasers.

(8) Organizing cash register manufacturing concerns and cash register sales concerns and maintaining them, ostensibly as competitors of their company, but in fact as convenient instruments for use in gaining the confidence and obtaining the business secrets of competitors and accomplishing the objects of the conspiracy and making such use of competitive concerns from time to time acquired by it.

(9) Inducing by offers of much greater compensation the agents and servants of such competitors and dealers patronizing them to leave their employment and cease patronizing them and to enter its employment and patronize it.

(10) Applying and causing application to be made for patents upon the cash registers and the improvements thereupon of such competitors, for the purpose of harassing them by interference proceedings and suits and threats to institute such proceedings.

(11) Using of or originating and using of and instructing and requiring of its agents and sales agents to use of or to originate and use such other unfair means excluding other concerns besides it from engaging in said interstate trade as might at any time become or appear to them or those agents or sales agents to be necessary or convenient to accomplish the object of the conspiracy, a description of which means other than already described the grand jury are unable to set forth, because such means were so numerous in kind and shifting in character as to make such description impossible.

The count then concludes with the general charge that so it is that the defendants during the three years next preceding the finding of the indictment unlawfully have knowingly engaged and participated in a conspiracy in undue and unreasonable restraint of interstate trade and commerce in cash registers, which has restrained that trade and commerce by unfair means and means which have unlawfully and irresistibly excluded others from engaging therein.

The second count contains but a single sentence and charges that the defendants, " at divers times during the three years next preceding the finding and presentation of this indictment, at and within the said Western division of the Southern district of Ohio, under the circumstances and conditions and by use of the means set forth and described in the first count of this indictment, unlawfully have, by drawing to said the National Cash Register Company and causing that company to grasp it, monopolized a part of the trade and commerce which, but for their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the man[614]ner in said first count specified would, during this period, have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company mentioned in said first count as having carried on business during said three years—said means being, as in said first count shown and charged, unfair, oppressive, tortious, illegal, and unlawful under said circumstances as against said other concerns, and of a nature under said circumstances irresistibly to exclude those concerns from engaging in that trade and commerce; said grand jurors being unable by reason of the

great extent thereof and because the same are unknown to them, the said grand jurors, to enumerate or describe the items of such trade and commerce in cash registers so monopolized by said defendants; and the allegations of said first count, descriptive of such cash registers, of said interstate trade and commerce in the same, and the concerns engaged therein, and of the means employed by said defendants to restrain said interstate commerce and the allegations of said first count as to knowledge, intent, and overt acts on the part of and by said defendants being incorporated in this count by reference as fully as if they were repeated in this count as part of the charge of monopolizing in this count made."

The third count likewise contains a single long sentence, and charges that the defendants, "having before the period of three years next preceding the * * * indictment, in the manner, by the means, and under the circumstances and conditions mentioned and described in the first count, * * * engaged, as said grand jurors * * * here charge they did engage, in the unlawful conspiracy in said first count described, and having, in and by so engaging in that unlawful conspiracy, drawn, as said grand jurors * * * here charge they did draw, to said the National Cash Register Company, and caused, as said grand jurors * * * charge they did cause, said the National Cash Register Company to grasp, a part of the trade and commerce among the several States in cash registers; that is to say, that part of said trade and commerce which, but for their so engaging in that unlawful conspiracy and their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner and under the circumstances in said first count specified, would have been secured or retained, as a matter of lawful right, by the divers concerns other than said the National Cash Register Company, mentioned in said count as having carried on business, before said period of three years (said means being, as in said first count shown and charged, unfair * * * under said circumstances as against said other concerns, and of a nature under said circumstances irresistibly to exclude those concerns from engaging in that trade and commerce), and each of said defendants, well knowing all the premises in this in-

dictment aforesaid, unlawfully have, throughout said period of three years next preceding the * * * indictment, continued to hold, conduct, and carry on said interstate business of said the National Cash Register Company, so by said means before said period augmented, and thereby have monopolized said interstate trade and commerce in cash registers—said grand jurors being unable, by reason of the great extent thereof, and because the same are unknown to them, the said grand jurors, to enumerate or describe the items of such trade and commerce so as in this count aforesaid monopolized by said defendants; and the allegations of said the first count descriptive of such cash registers of said interstate trade and commerce in the same, and the concerns engaged therein before said period of three years, and of the means so employed by said defendants, * * * also the allegations of said first count as to knowledge and intent on the part of said defendants, being * * * incorporated in this count by reference as fully as if they were repeated in this count made against said defendants."

Lawrence Maxwell, of Cincinnati, Ohio; *John F. Wilson*, of Columbus, Ohio; *John A. McMahon*, of Dayton. Ohio; and *John S. Miller*, of Chicago, Illinois, for plaintiffs in error.

Daniel W. Iddings, *Robert R. Nevin*, and *David B. Van Pelt*, all of Dayton, Ohio, filed a separate brief for plaintiffs in error on the question of venue; and also filed separate briefs for plaintiff in error, Alfred A. Thomas.

Francis J. Wing, of Cleveland, Ohio, filed a separate brief for plaintiff in error, Joseph E. Rogers.

John B. Stanchfield, of New York City, filed a separate brief for plaintiff in error, Thomas J. Watson.

Sherman T. McPherson, U. S. Attorney, of Cincinnati, Ohio; *Edward P. Moulinier*, Ass't U. S. Attorney, of Cincinnati, Ohio; and *John L. Lott*, Special Assistant to the Attorney General, of Tiffin, Ohio, for the United States.

Opinion of the Court.

Before DAY, Circuit Justice, and COCHRAN and SANFORD, District Judges.

[615] COCHRAN, District Judge (after stating the facts as above).

[1] The first questions which come before us are those raised by the assignment complaining of the order overruling the demurrer to each count of the indictment. Only three of them need be noticed. They are that no offense against the United States was charged, and that it was void for uncertainty and bad for duplicity. The grounds of uncertainty and duplicity as to the first count are not seriously urged. Yet it will aid in bringing out its meaning, of which, in view of the other questions in the case, it is important to be sure, if we proceed upon the assumption that they are. Before indicating wherein these grounds are presented, the meaning of the count in two particulars should be determined. One is as to the duration of the existence of the competitors of the National Company named in the second item of the introductory statement. Is the meaning that each one of them was in existence during the entire 20 years preceding the indictment, and, if not, what is the meaning in regard thereto? A first blush view may lead to the conclusion that the meaning of the count is that each one of them was so in existence. But close observation will disclose that such is not its thought. The Government so contends, and it is not urged otherwise by defendants.

Perhaps it is in the interest of the claim of duplicity to have it that way. As a matter of fact no one of them was so in existence. It is only true to say that during the entire period one or more of them were in existence. Indicative that such is not its thought is the statement in the general charge of the conspiracy that the means by which its object was to be accomplished were such that they had "unlawfully, wrongfully, and irresistibly excluded others," and the further statement in the description thereof that the intent was to compel the competitors named either to go out of business or to sell and transfer their business to the National Company, so that in the latter case it could discontinue such business, "as in most cases it in fact did." This implies that in some,

if not in many, instances that company did acquire the business of some of those competitors, and affirms that in most of those cases it discontinued the business. In such cases, therefore, the competitors did not continue to exist until the finding of the indictment. If, then, it is not the thought of the count that all the competitors were in existence at that time, it is not its thought that all were in existence at the beginning of the 20 years. We think, then, that its thought must be taken to be, in accordance with the fact, that during the entire 20 years there was no time that one or more of them were not in existence with no disclosure whatever as to when any of them were in existence other than that it was during that period. Such is the presupposition of the second and third counts as to the allegation of the first on this subject, and, not only this, but also that it mentions which of them were in existence and carrying on business during the three years preceding the indictment and which during the time preceding the three years, to which extent it is incorrect.

[2] The other particular is one as to which the parties differ. It is urged by defendants that the conspiracy charged is a conspiracy against the 32 competitors named and not a general conspiracy against all competitors. This the Government will not concede. But we think that there is no escaping the conclusion that the charge is of a conspira-[616]cy against the competitors who are named and that it is limited thereto. In charging the offense generally the allegation is that the conspiracy was in restraint of the interstate trade and commerce "carried on by the several concerns in this count above named other than the National Cash Register Company," and thereafter reference is made solely to them by the use of such phrases as "said" or "such other concerns than said the National Cash Register Company" or "said competitors" or "such competitors."

It is, then, in the truth of the positions thus taken as to the meaning of the count in these two particulars that an opening is made for the claim of duplicity. If its allegation were that each of the competitors named was in existence during the entire 20 years there would be no such opening. single conspiracy against them specifically would include

them all. But as they were not all so in existence, how is it possible for a single conspiracy to cover them? It may be thought that there must have been a conspiracy against those in existence at the beginning of the 20 years, and then successive conspiracies against the others as they came into existence. If such were the case, undoubtedly the count would be duplicitous.

In 5 R. C. L., p. 1081, it is said:

"The court will never be keen to hold an indictment bad for duplicity."

[3] But it is not necessary to give way to bias against the defense of duplicity here to rid ourselves of it. Though, as we have seen, the charge of the count is of a conspiracy against competitors who are named and is limited thereto, its underlying thought is that there was a generic conspiracy against all competitors, and that this conspiracy took specific direction against the competitors named as they came into existence and continued against them as long as they remained in existence. In the second item of the introductory statement, where those competitors are named, it is alleged that they are all the competitors known to the grand jurors, which was as much as to say that if others had been known they would have been named also, and the charge would have been made that the conspiracy included them also. This could only have been on the basis that there was a generic conspiracy against all competitors. The effect of this consideration is merely to relieve the count of any claim of duplicity. It is the tie that binds. It did not render the defendants subject to conviction for the generic conspiracy so presupposed. In spite of it they were only subject to conviction for a conspiracy against the competitors who were named. What we have, then, in the count is a single conspiracy. It began at least 20 years preceding the indictment. At the beginning it was directed against the competitors named then in existence, and continued against them until they ceased to exist. As the others came into existence, it was directed against them and continued against them until they ceased to exist, or, in case they had not ceased to exist at the time of the finding of the indictment, until then. And all of the defendants were not parties thereto during its en-

tire existence, but only such of them—four in number—as were then connected with the National Company at the beginning of the 20 years. As the others became connected with it, they became parties to the conspiracy, and remained so until the finding **[617]** of the indictment, except as to the four who ceased their connection in 1910 and 1911, when they ceased to be parties thereto. Such we take to be the conspiracy charged in the first count.

[4] Of course the defendants were subject to conviction under the first count only in so far as the conspiracy charged existed within the three years preceding the indictment and as to the competitors who were then in existence. Because of the bar of the statute of limitations, no conviction could have been sought in so far as it existed prior to the three years. The reference to its prior existence and to its being against competitors not in existence during the three years was merely in order to a description of the conspiracy. Apart from this the count is to be taken as charging only a conspiracy within the three years against those of the competitors named then in existence. That it did not allege which of them were in existence did not render the count void for uncertainty.

[5] It remains to consider whether the count is defective in not charging an offense against the United States. There is but one particular in which it is claimed that it comes short of so charging, and that is in not alleging facts showing that the trade and commerce conspired against was interstate. In item 4 of the introductory statement the character of the trade and commerce in which the competitors named were engaged is set forth, and the charge is that it was that trade and commerce which was conspired against. Unless, therefore, such trade and commerce was interstate, the point is well taken. It is urged that, in determining whether it was or not, no help can be obtained from the claim made in that item that it was. It must be determined solely from what it is alleged that the competitors named had done. So limiting the consideration, it is claimed that all that is alleged could have been done and yet the competitors not have been so engaged. As to sales and shipments pursuant thereto the allegation is satisfied by sales calling

Opinion of the Court.

for delivery to the purchasers in the State of manufacture and shipments to them therein; the transportation from that State to the States of the purchasers being by them. And as to consignments for sale to dealers and agents the allegation is satisfied in the same manner. But in such cases the transportation from the State of manufacture to the State where the sale was to be had by the agents, if not also by the dealers, was by the competitors, through the agents and dealers. So doing, however, is such an unusual way of transacting business that the fair meaning of the allegation should be taken to be that the sales were for delivery in the State of the purchaser, and the shipments pursuant thereto were from the State of manufacture to such States, and so as to the consignments for sale. It is merely contended that the allegation does not "necessarily" mean this. Whilst it may not necessarily so mean, such we take to be its fair meaning, and whilst the claim that the business the competitors did was interstate can not supply an omission in the allegation as to what they did, it can serve as an aid to its interpretation. It must be held, therefore, that the first count is good.

The second count alleges that the defendants had monopolized a part of the interstate trade and commerce in cash registers. It alleges that [618] defendants had so done at divers times during the three years preceding the indictment, within the lower court's district, and under the circumstances and conditions set forth and described in the first count. The way in which they had so done was by the use of the means therein set forth and described. They had thereby drawn that part of that trade and commerce to the National Company and caused it to grasp it. That part of that trade and commerce was the interstate trade and commerce in cash registers which, but for the use of those means by defendants, would have been secured or retained by the competitors named in the first count as having carried on business during those three years. It will be noted that the allegation is not that the defendants had monopolized the interstate trade and commerce in cash registers in the United States or in some particular portion thereof. It is that they had monopolized a part of such trade and commerce,

and that the part which they had monopolized was that part thereof which the competitors referred to would have secured or retained, but for the use of those means by the defendants. The meaning of the allegation is no more than this—that by the use of those means the defendants had made interstate sales of cash registers for the National Company which, but for the use thereof, those competitors would have made. That such is its meaning is borne out by the allegation that it was "at divers times" that defendants had monopolized a part of that trade and commerce, and the further allegation that because the items thereof were unknown and of great extent they could not be enumerated or set forth in the count.

Assuming that what was done, as set forth in the count, constituted monopolizing within the second section, it is questionable whether the company was not the monopolizer and the defendants were mere aiders and abettors. But as aiders and abettors are liable as principals this is unimportant.

[6-9] Assuming, further, that the count charges no more than that defendants by the use of those means had made interstate sales of cash registers for the National Company which, but for the use thereof, those competitors would have made, the question arises whether this is an offense under section 2; i. e., whether the making by one competitor of an interstate sale or interstate sales of a commodity by the use of wrongful means which, but for the use thereof, another competitor or other competitors would have made, constitutes monopolizing a part of interstate trade and commerce by such competitor within the meaning of the second section. It should be approached through the first section. It is now settled that that section covers those contracts, combinations, and conspiracies only which are unreasonably in restraint of interstate trade or commerce. Possibly every conspiracy in restraint thereof is unreasonably so. This is on the idea that there is no such thing as a reasonable conspiracy, or a conspiracy to do a reasonable thing. It is a contradiction in terms. The section includes conspiracies between competi-

tors, or between the officers and agents of a competitor on its behalf against a competitor. But it is not limited to such conspiracies. It includes also conspiracies between any persons, whoever they may be, against any other person. *Loewe* v. *Lawlor*, **[619]** 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. It is not essential that the execution of the conspiracy be of any benefit to the conspirators. It is sufficient that it will be in restraint of another's interstate trade or commerce. And it is immaterial what is the extent of the interstate trade or commerce conspired against. In the case of *Steers* v. *United States*, 192 Fed. 1, 112 C. C. A. 423, it was held by this court that a conspiracy in restraint of a single interstate shipment was within the section. There is no act of interstate trade or commerce so insignificant as not to be protected by it. Clearly, then, a conspiracy between the officers and agents of one competitor on its behalf in restraint of a single interstate sale or shipment of another competitor is covered by it.

[10–11] But it does not follow from this that the making by one competitor of a single interstate sale or a great number of such sales by the use of wrongful means, which, but for the use of such means, another competitor would have made, is a monopolizing of a part of the interstate trade or commerce within the meaning of the second section, and covered by it. Whether it is covered by it depends upon what it is to monopolize, and what is "any part" of interstate trade or commerce, within its meaning. The word "monopolize" is used in this section in a legal and accurate sense. Its root idea is to exclude. To monopolize trade or commerce, or a part thereof, is to exclude persons therefrom. It is not, however, to exclude all persons. In the case of a perfect monopoly, which in experience has arisen only from a sovereign grant, the exclusion is of all persons but one, or, perhaps, a group of persons. By reason of such exclusion such person or group of persons secure the entire field covered by the grant to themselves. But it is not such monopolizing that the section has in mind. It is monopolizing by the acts of individuals. Mr. Justice McKenna, in

Opinion of the Court.

National Cotton Oil Co. v. *Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689, said:

"The idea of monopoly is not now confined to a grant of privileges, but is understood to include a condition produced by the acts of individuals."

In the case of such a monopoly it would seem that it is not essential that all but the insiders be wholly excluded, so that they have the whole field to themselves. It is sufficient that outsiders are substantially excluded, so that the insiders have to themselves approximately, or "a largely preponderating part of," the whole field. But the section does not cover every monopolizing by the acts of individuals. A monopolizing by efficiency in producing and marketing a better and cheaper article than any one else is not within it. However, possibly, efficiency is so abundant that in experience there never will be, as there never has been, such a monopolizing. It is possible for there to be a monopolizing by a combination of competitors. Such combinations have been divided into "combinations by agreement," or "loose combinations," in which each member of the combination remains in the field, notwithstanding the combination, as in the case of *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and "combinations by fusion," or "corporate combinations," as in the Standard Oil and Tobacco cases. Possibly in cases of the former class, where there is no exclusion of outsiders, it is not proper to say that there is a monop[620]olizing, as in that contingency there is no exclusion. At most it may not be proper to say more than that there is a combination in restraint of trade. But in the latter case, notwithstanding there is no exclusion of outsiders, there is no reason for not characterizing what has been done as monopolizing, for in such case there is exclusion. The members of the combination are excluded for the benefit of the single corporation into which they are fused. Mr. Justice McKenna seems to have had such monopolizing in mind in the case of *National Cotton Oil Co.* v. *Texas*, *supra*, when he said:

"Its [monopoly's] dominant thought now is, to quote another, 'the notion of exclusiveness or unity'; in other words, the suppression of

Opinion of the Court.

competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.'"

A combination of competitors, accompanied by exclusion of outsiders, and the exclusion by a competitor, or by its officers and agents on its behalf, of competitors by the use of such means as are charged here, clearly constitute monopolizing within the section. Mr. Chief Justice White in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, pointed out that monopolizing was a species of restraint of trade or commerce, so that a combination or conspiracy to monopolize a part of interstate trade or commerce is covered by both sections. In this particular they overlap. We have seen that conspiracies in restraint of trade and commerce are not confined to conspiracies by competitors, or on behalf of a competitor against a competitor. It is not even necessary that the execution of the conspiracy be of any benefit to the conspirators. It is sufficient that it will restrain the interstate trade or commerce of the person conspired against. But in the case of monopolizing under the second section, where there is exclusion by a competitor, or a combination of competitors, of competitors substantially from interstate trade or commerce, it is in order that the former may have the whole or approximately the whole of the field to itself or themselves. It is penalized, so that there may be no such exclusion, and the field may be occupied by all on equal terms.

It follows from this general survey that there can be no monopolizing in the legal and accurate sense of the word where there can be no common occupation. Where in the very nature of things there must be exclusion of all others but one, there can be no monopolizing. Hence, it would seem that there can be no monopolizing in making a single interstate sale, or in making a great number of such sales, even though wrongful means are used in making them. A wrong has been done the competitors, but the wrong is not that of monopolizing. In the very nature of things but one competitor can make the sale. The idea that such conduct

constitutes monopolizing is not according to the legal and accurate meaning of the word. It can only be such according to a popular conception thereof.

[13] But, though but one competitor can make a sale, all competitors can enjoy the free opportunity of approaching each and every prospective purchaser on equal terms, with the chance of making a [621] sale if he can persuade him to buy. For one competitor to exclude all or substantially all other competitors from such opportunity—i. e., drive them from the field of freely offering their goods, so as to have that field to himself—is to monopolize according to the legal and accurate sense of the word.

[14] This leads to a consideration of what is "any part" of interstate trade or commerce, within the meaning of the section. What are the possible parts of interstate trade or commerce that may be covered by it? The interstate trade or commerce in a particular commodity of all prospective purchasers thereof in the United States is a part of interstate trade or commerce; also the interstate trade or commerce in such commodity of all prospective purchasers thereof in some particular portion thereof is a part thereof. And also the interstate trade or commerce in such commodity of any prospective purchaser thereof wherever located in the United States is a part thereof. There can be no question that the first two are parts of interstate trade or commerce within the meaning of the statute. The case of *Montague* v. *Lowery*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, involved a monopolizing of the second part of interstate trade or commerce above referred to. The only question is as to the third part. Is the interstate trade or commerce of a prospective purchaser a part thereof within it? The case of *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, involved the question whether it is. There a manufacturer of plug chewing tobacco had refused to sell to a jobber unless he would agree not to purchase such tobacco from its competitors, but to give his entire business to it, and the question was whether such conduct on its part was an attempt to monopolize a part of interstate trade or commerce under the section. This

Opinion of the Court.

depended on whether the interstate trade or commerce of that jobber was a part of such trade or commerce within its meaning, and whether the means by which it was attempted to monopolize it was wrongful. It was held that the case did not come within the section. The apprehension that, if it was held that it did, then every interstate sale would be within it, seems largely to have brought it about. This is to be gathered from certain expressions in Judge Sanborn's opinion, repeated in *United States* v. *Standard Oil Co.* (C. C.) 173 Fed. 177, 191. He there said:

"Undoubtedly every person engaged in interstate commerce necessarily attempts to draw to himself, to the exclusion of others, and thereby to monopolize, a part of that trade. Every sale and * * * transportation of an article which is the subject of interstate commerce evidences a successful attempt to monopolize that trade or commerce which concerns that sale or transportation. If the second section of the act prohibits every attempt to monopolize any part of interstate commerce, it forbids all competition therein, and defeats the only purpose of the law; for there can be no competition, unless each competitor is permitted * * * to draw to himself, and thereby to monopolize, some part of the commerce."

But there was no reason for such apprehension, for, as we have seen, interstate sales do not come within the section, because in such cases there is no monopolizing. It is only the conception of the meaning of that word according to popular speech that could create such [622] an apprehension. It was such a conception that led Judge Ward in *United States* v. *American Tobacco Co.* (C. C.) 164 Fed. 700, 727, to say:

"As this section prohibits a monopoly of, or an attempt to monopolize, any part of such commerce, it can not be literally construed. So applied, the act would prohibit commerce itself."

In dealing with this subject the Supreme Court, speaking by the Chief Justice, in the *Standard Oil Company case*, 221 U. S. 61, 31 Sup. Ct. 516, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, said:

"The commerce referred to by the words 'any part,' construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

Opinion of the Court.

This excludes therefrom the interstate trade or commerce of a particular prospective purchaser of a particular commodity, and confines it to the interstate trade or commerce of all prospective purchasers of a particular commodity in the United States or in some particular portion thereof. Reasoning from the analogy to a monopolizing by sovereign grant leads to the conclusion that such is a true construction of the section. In case of such monopolizing it is of a particular commodity, and in olden times in England it was limited in some instances to particular portions of the Kingdom.

[15] The second count charges that defendant had monopolized a part of the interstate trade and commerce in cash registers "under the circumstances and conditions set forth and described in the first count," and in the latter part it makes part thereof the allegations of that count descriptive of that trade and commerce, the concerns engaged therein, and the means employed by defendants, and as to knowledge, intent, and overt acts on the part of and by defendants. In the light of the entire context, we think the word "monopolized" should be construed as meaning "secured." So construing it, the question arises whether the offense which the count charges is not that of monopolizing the interstate trade and commerce in cash registers, and not a part thereof.

[16] There is no rule of law requiring the offense intended to be charged in an indictment to be charged expressly in general terms. It is sufficient if the facts alleged, if true, show the commission of the offense. If, then, the effect of what the second count alleges that the defendants had done, if done by them, was the commission by them of the offense of monopolizing the interstate trade and commerce in cash registers, that is the offense charged against them, and to which reference was had by the use of the words "charge of monopolizing in this count made" at the end of the second count.

Now, the offense of monopolizing consists not only in obtaining or securing, in the first instance, a monopoly by the [illegible] acts of individuals, but in holding and maintaining [illegible]. According to the allegation of the first count,

during the preceding 3 years the National Company had a practical monopoly in cash regis[623]ters. It did approximately 95 per cent of the manufacturing and selling of cash registers. Also, according thereto, the defendants carried on the business of the National Company on a plan involving the use of the means therein set forth, with the intent and purpose to restrain the interstate trade and commerce of all its known competitors and to drive them out of business. Such are the circumstances and conditions under which it is alleged that the defendants had secured for the National Company interstate sales of cash registers by the use of those means which, but for the use thereof, would have been secured by those competitors. Such action on the part of defendants was calculated to hold and maintain the monopoly which the National Company had. It being done with such intent, it was done with the intent to maintain and hold the monopoly. It seems to us, therefore, that the count does charge the commission of the offense of monopolizing interstate trade and commerce in cash registers during the 3 years preceding the indictment. This being so, it is not duplicitous. It charges but a single offense.

[17] But this is not all that is to be said upon this count. The competitors whose interstate trade and commerce are alleged to have been secured by defendants for the National Company by the use of the means complained of are alleged to be those "mentioned in said first count as having carried on business during said 3 years." When, however, we turn to the first count, we do not find any of the competitors named therein mentioned as having carried on business during the 3 years preceding the indictment. It is only on the hypothesis that the count alleges that all of the 32 competitors carried on business during the whole 20 years that it can be said that it mentions those of them who carried on business during the 3 years. But we have seen that the Government does not contend that such is the meaning of the allegation, and we have held that it does not mean it. It means no more than that during the entire 20 years some of the competitors were carrying on business without giving any indication whatever as to when any of them were so

doing. The competitors, then, whose business it is alleged the defendants secured by the use of those means, are incapable of identification. It is not those who in fact carried on business during the 3 years, but those which the first count mentions as then carrying on business; and it does not mention which of them so did. We see no escaping from the conclusion that the count on this ground is void for uncertainty. We are aware that the point is somewhat technical, and that it is in the air now that the courts should be indulgent to looseness in pleading, even in an indictment. But that indulgence goes no farther than that an indictment is to be "taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech." It should not go to the extent of taking it to mean that which "by a fairly exact use of English speech" it does not mean, or, in other words, when it says competitors "mentioned in said first count as having carried on business during said 3 years," it should be taken to mean competitors who did carry on business during those 3 years. The words of Mr. Justice Brewer in *Clyatt* v. [624] *United States*, 197 U. S., 207; 25 Sup. Ct., 429; 49 L. Ed., 726, come in here. They are:

> "Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

On this ground we think the count is defective, and the court erred in overruling the demurrer thereto.

[18] This brings us to the third count, and we need not spend much space upon it. It charges that the defendants, having before the 3 years preceding the indictment, engaged in the unlawful conspiracy described in the first count, and having by engaging therein drawn to the National Company and caused it to grasp that part of the interstate trade and commerce which, but for their engaging therein and by the use of the means described in the first count, would have been secured or retained by the competitors mentioned in the first count as having carried on business before those 3 years, had during those 3 years continued to hold, conduct, and carry on the interstate business of The National Company so by those means before those 3 years augmented and there-

by had monopolized the interstate trade and commerce in cash registers. The monopolizing here charged, it will be noted, is not of a part of said trade and commerce, but such trade and commerce. It differs from the second count in that it does not allege that during the 3 years preceding the indictment defendants had secured for the National Company any such trade or commerce by the use of wrongful means, which, but for the use thereof, would have been secured by its competitors. What it charges the defendants did was that during the 3 years they had continued to hold, conduct, and carry on the interstate business of the National Company, augmented by the interstate trade and commerce in cash registers which before the 3 years, by the use of the means complained of, they had drawn to the National Company and caused it to grasp, and which, but for the use of those means, would have been secured or retained by those of its competitors mentioned in the first count as having carried on the business before the 3 years. It will be noticed that the same uncertainty exists here as to the interstate trade and commerce in cash registers secured by the National Company, by the use of those means, before the 3 years, and held on to by it during the 3 years. It is that which, but for the use thereof, would have been secured by those of its competitors which are mentioned in the first count as having carried on business before the 3 years preceding the indictment. The first count no more mentions which of them carried on business before the 3 years than it does those which so did during the 3 years. On this ground the count is bad.

But it is otherwise insufficient. It does not charge an offense against the United States, i. e., the offense of monopolizing a part of interstate trade and commerce, and that for two reasons. According to the allegations of the first count, made a part of this, the cash registers manufactured and put on the market by the National Company during the 20 years were patented. It owned patents which covered them. So far as the third count goes, the interstate trade and commerce [625] which it so secured may have been covered by its patents, and it was in law entitled to it thereunder. It may not have had a right to get it in the

way charged, but should have asked the courts to protect its rights. This is a question that will be considered later. In holding onto it thereafter it could not have been guilty of monopolizing, even if otherwise it might have been. The indictment, having thus charged that the National Company had patents covering the cash registers made and sold by it, should have negatived that the trade and commerce which it so secured and held onto was covered by those patents. In the first count it is alleged that defendants' conduct therein complained of was not "justified or warranted by any letters patent"; but it was not meant thereby to charge that the trade and commerce affected by the conspiracy complained of therein was not covered by the National Company's patents, for it is the position of the Government that the defendants were not justified or warranted by those patents in protecting the rights so secured in that way. It is charged in the first count that at the beginning of the 20 years the National Company did 80 per cent of the manufacturing of cash registers. This of itself was a practical monopoly. It is not alleged that it had been secured by wrongful acts. Presumably it was entitled to it under its patents. It is true that it is alleged that long before the 3 years preceding the finding of the indictment most of the basic patents and many of the improvement patents had expired. But this concedes that some of the basic patents were then still unexpired at the beginning of the 3 years, and it is consistent with the fact that such was the case as to a great number of improvement patents. Everything, therefore, which the count alleges, may be true, and yet the National Company have been entitled to hold onto the business which it had so secured, in which case its conduct in so doing could not have been monopolizing.

[19] But otherwise the count does not charge the offense of monopolizing, in that it does not allege that defendants had done anything during the three years to maintain and to hold its monopoly. In the case of a monopoly brought about by monopolizing through a "combination by fusion" or "corporate combination" the monopolizing exists as long as the combination continues to exist. It can at any time be dissolved, and its constituent elements restored to existence.

Opinion of the Court.

But in the case of a monopolizing by wrongful means, as here, the monopolizing ceases whenever the pugnacious competitor ceases to fight. It is not possible to resurrect the competitors who have been slain in the contest and restore to them what they have lost. Such competitor does not continue to monopolize, within the meaning of the statute, in holding onto the spoils of victory. It is never to be lost sight of that actually doing business, no matter how large, is not monopolizing. It is excluding from the opportunity of doing business that is. If it is thought that this is an evil condition of things, which should not be allowed to continue, the answer is that things should not have been allowed to get in that condition. The competitors attacked should have called upon the courts to protect them whilst they were being attacked.

[626] In the case of *United States* v. *Irvine*, 98 U. S., 450, 25 L. Ed., 193, it was held that the offense of withholding pension money was complete upon its first being withheld, and that it did not continue thereafter, even though the money was never paid to the pensioner. And in the case of *United States* v. *Kissel*, 218 U. S., 607, 31 Sup. Ct., 126, 54 L. Ed., 1168, Mr. Justice Holmes said:

"It also is true, of course, that the mere continuance of the result of a crime does not continue the crime."

[20] It is also urged that the third count is bad for failing to allege proper venue. It would seem to be clear that it was essential to allege that the offense charged was committed within the district where the indictment was found. Otherwise, the court had no jurisdiction of the offense. It would seem clear, also, that the third count is not aided by the allegation of venue in the first and second counts, unless such allegation is incorporated in the third count by reference thereto. The Government does not differ with the defendants as to these two propositions. Its position is that the allegation of the first count as to venue is so incorporated in the third. It makes this out from the fact that it alleges by way of recital that the defendants had, prior to the three years preceding the indictment, engaged in the unlawful conspiracy charged in the first count "under the circumstances and conditions mentioned and described in the first count."

But this has reference to the conspiracy charged in the first count. It has no reference to the offense charged in the third count, to wit, of holding, conducting, and carrying on the business unlawfully acquired.

It must be held, therefore, that the third count is bad, and the lower court erred in overruling the demurrer thereto.

[21] 2. We come now to the assignment that the court erred in overruling defendants' motion that the trial be had at Dayton. Section 100 of the Judicial Code divides Ohio into two judicial districts, Northern and Southern, and the Southern into two divisions, Western and Eastern. It provides that certain terms of the District Court for the Western Division shall be held at Cincinnati and certain for the Eastern at Columbus. Then follows this provision:

"*Provided*, That terms of the District Court for the Southern District shall be held at Dayton on the first Mondays in May and November. Prosecutions for crimes and offenses committed in any part of said district shall also be cognizable at the terms held at Dayton. All suits which may be brought within the Southern District, or either division thereof, may be instituted, tried, and determined at the terms held at Dayton."

This is a continuation or re-enactment of the act of March 4, 1907 (34 Statutes at Large, 1294), which first provided for the holding of terms of court at Dayton. This prosecution was instituted at Cincinnati. It is not claimed that the lower court abused its discretion, if, indeed, it had any, in overruling this motion, but that defendants were entitled as a matter of right to have the case transferred to Dayton for trial. The sole ground of the motion was that the National Company's plant and principal office is located there, and 11 of the defendants resided there, and that none of them resided at Cincinnati. We fail to find any basis whatever for this position. It will be noted that [627] Dayton is made a place for holding court for the entire Southern District. As to prosecutions for crimes and offenses committed in any part of the district, they "shall be cognizable," and as to suits which may be brought within the district—i. e., of which it has jurisdiction—they "may be instituted, tried, and determined" at Dayton. The provision that such prosecutions shall be cognizable at Dayton does not require that

they be instituted there; otherwise no prosecution could be instituted at Cincinnati or Columbus, but all would have to be instituted at Dayton. No more does it require that any prosecution instituted at Cincinnati or Columbus shall be transferred there for trial. The only possible question which can arise is whether any prosecution instituted at Cincinnati or Columbus can be transferred to Dayton. The original act provided for such transference of pending suits and nothing else. This assignment, therefore, is not well taken.

[22] 3. Chronologically the assignments calling in question the rulings on the admissibility of evidence come next. But we prefer to pass at once to the assignment that error was committed in overruling defendants' motion to direct the jury peremptorily to find a verdict for them. As introductory to its consideration, two things should be clearly understood. One is as to what, under the evidence, was the case which it was open to the Government to claim should be submitted to the jury. It was whether within the 3 years preceding the indictment the defendants conspired in restraint of the interstate trade or commerce in cash registers of the American Company of Columbus by the use of the fifth and ninth means specified therein. We make this out in this way: Certainly it was not more than whether the defendants within that time conspired in restraint of such trade or commerce of the competitors named who were in existence during the 3 years by any of the means specified. It did not include whether they at any time conspired against any other of the competitors named therein because, as they had ceased to exist prior to the 3 years, defendants could not have conspired against them within the 3 years, and, so far as they conspired against them prior to the 3 years, i. e., whilst they were in existence, as the prosecution therefor was barred by the statute of limitations, the indictment did not seek conviction for the conspiracy as to them. Nor did it include whether they at any time conspired generally, i. e., against all competitors, because whilst, as we have seen, the underlying thought of the first count is that they so conspired, and that this conspiracy was directed against the competitors named during and as they came into existence, the count did not seek conviction for such generic conspiracy.

Properly construed, it sought conviction for a conspiracy against the named competitors only, and those only who were in existence during the 3 years. And so far as such generic conspiracy existed prior to the 3 years the prosecution for it, too, was barred. It follows, therefore, that that case was not more than whether the defendants within the 3 years conspired in restraint of such trade or commerce of the American of Columbus, the Michigan, the Peninsular, the Burdick-Corbin, the Jewell, and the Dial by any of the means specified, for these were the only competitors who were in existence during the [628] 3 years. The Bensinger and Hopkins-Robinson were not in existence at any time within the 20-year period, the St. Louis is not mentioned in the evidence, the Bundy was not in the cash-register business, and all the others ceased to exist prior to the 3 years. The last of them to go out of existence was the Union, and it ceased to exist as a competitor November 1, 1906.

[23, 24] But the case was not even this much. It is not claimed by the Government that the generic conspiracy was ever directed against the Peninsular, the Burdick-Corbin, the Jewell, or the Dial. It only claims that it was directed against the American of Columbus and the Michigan. The American came into existence not later than the early part of 1907, and the Michigan in 1908. And, so far as the Michigan is concerned, there was no substantial evidence that such conspiracy was ever directed against it. There was evidence of but two acts which can be said to have been unfriendly towards it, only one of which was in the 3 years. They were directed not against it, but against two dealers in the machine, who purchased them outright and resold them. Its president and organizer, who had been connected with the National Company and who ceased his connection therewith in July, 1907, then holding the position of general manager, was one of the principal witnesses for the prosecution, and he made no complaint whatever of the National Company's attitude or action toward his company. Possibly the reason why the generic conspiracy, assuming that there was one, was never directed against these five companies, i. e., the Peninsular, the Burdick-Corbin, the Jewell, the Dial, and the Michigan, was because they did not seriously

endanger the National supremacy. And, in view of this, perhaps the generic conspiracy should be stated to be, not that it was against all competitors, but only against such as might endanger such supremacy. Such is the way, then, in which we limit the case which it was open to the Government to claim should be submitted to the jury to the American of Columbus. But we also limit it under the evidence as to the means to be used in accomplishing the object of the conspiracy against that competitor; i. e., to the fifth and ninth. It is not claimed that the defendants conspired to use the fourth means against any competitors. The first, second, and third means were not means to accomplish that object. They were not calculated, in and of themselves, to restrain the trade or commerce of any competitor. If no use was made of the information thereby obtained, no competitor would be restrained in his trade or commerce. Their sole function, therefore, was to enable the defendants to use other means which, in and of themselves, were calculated to restrain. It did not include the sixth, seventh, and tenth means, because there was no substantial evidence that the defendants at any time, much less within the 3 years, conspired in restraint of that company by the use of those means.

It may be assumed in this connection that there was substantial evidence that the generic conspiracy and the specific conspiracy against the competitors who ceased to exist prior to 1907 included the use of such means, but it does not follow that the conspiracy against the American of Columbus included the use thereof. There was not a [629] particle of evidence that any such applications for patents as are called for by the tenth item, or that threats to that company, or to any purchaser or prospective purchaser of its machines, to begin suits for infringement against it or him, called for by the sixth item, were ever made. But a single suit for infringement was ever brought. That was brought against that company itself in the District Court of the Southern District of New York in 1908. The National obtained therein a decree of infringement, which was reversed on appeal. *National Cash Register Co.* v. *American Cash Register Co.*, 178 Fed. 79, 101 C. C. A. 569. The patent was held in-

valid because of the sale of a single machine covered by it more than 2 years before its issue. The fact that the National was successful in the lower court is at least prima facie evidence of probable cause. The mere fact that there may have been a conspiracy—i. e., a joint purpose on the part of the defendants to restrain the trade of the competitors who ceased to exist before the year 1907 by the use of such means—is no evidence whatever that they had such joint purpose as to the American of Columbus, when during the 5 years of its existence preceding the indictment there was no manifestation of such purpose. The same is true as to the means covered by the eighth and eleventh items. We assume here, also, that there was substantial evidence that the generic conspiracy and the specific conspiracy against the competitors who ceased to exist prior to 1907 included the use of the means specified in the eighth item, and of other effective means not specified at all, but covered by the eleventh item. But there is not a particle of evidence that the defendants at any time within the 5 years of its existence contemplated the use of such means against the American of Columbus. And so it is that we limit the case which was open for the Government to claim should be submitted to the jury to whether the defendants within the 3 years preceding the indictment conspired in restraint of the interstate trade or commerce of the American of Columbus by the use of the means described in the fifth and ninth specifications.

[25] But in so limiting that case we are not to be understood as holding that the jury were not to consider at all whether the defendants conspired in restraint of the competitors named who ceased to exist prior to 1907 during their existence by the use of all the effective means specified except the fourth and of other effective means not specified covered by the eleventh item, and whether they were parties to a generic conspiracy of that character, and that evidence to this effect was not admissible. Our position is simply that those were subordinate issues in the case. The ultimate issue therein was whether the defendants had so conspired against the American of Columbus. The former issue had bearing

on the question whether there was a generic conspiracy, and the latter on the question whether there was a conspiracy against the American of Columbus when it came into existence, which continued into the 3 years. Our purpose in putting the matter thus is to bring out sharply just what was the ultimate issue in the case, after the close of the evidence. A clear understand[680]ing of this will aid us in disposing of the question in hand, and also the other questions yet to be considered.

It is, however, urged on behalf of defendants that the decision in the case of *Commonwealth* v. *Harley*, 7 Metc. (Mass.) 506, is against the consideration of a generic conspiracy in this case at all. It was there held that, under an indictment charging a conspiracy to defraud Stephen W. Marsh, evidence was not admissible of a conspiracy to cheat the public generally, or any person who might fall in the way of the conspirators. This was, however, on the ground—it could only have been on that ground—that the charge in the indictment excluded the thought of a generic conspiracy, and charged a conspiracy which in its origination was a specific conspiracy against Stephen W. Marsh. But that is not the case we have here. It is true that the indictment charges a specific conspiracy only, but it is not a conspiracy which was specific in its origination. In its origination it was a generic conspiracy, which became a specific conspiracy by being directed against the competitors named as they came into existence. Hence it was a pertinent question in the case whether there was a generic conspiracy during the 20 years, and there was no variance.

In the case of *People* v. *Gilman*, 121 Mich. 187, 80 N. W. 4, 46 L. R. A. 218, 80 Am. St. Rep. 490, a conviction was upheld under an indictment charging a conspiracy to defraud Edwin H. Sadler upon evidence of a conspiracy to cheat such persons as might be induced to attend certain seance meetings, and that he attended them. The decision is in conflict with the Massachusetts case, unless the indictment permitted the construction that it charged a specific conspiracy against Sadler by reason of a generic conspiracy being directed against him.

Opinion of the Court.

[26] So as to the first, second, and third means—the means which in and of themselves were non-effective—evidence tending to show that the conspiracy included them was admissible. And so far as there was substantial evidence to the effect that it did, it was for the jury to consider whether it did, but only as bearing on the further question whether it included, also, any of the effective means.

[27] The other thing which at this point should be clearly understood is whether, in order to there being such a case for submission to the jury, it is absolutely essential that anything was done in furtherance of such conspiracy within the 3 years preceding the indictment. We think that it is not. And this follows from Mr. Justice Holmes' illuminating and most helpful opinion in the case of *United States* v. *Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168. Before the decision in that case the question of the continuance of a conspiracy was in confusion and the authorities in conflict. There is no longer any confusion. The position there combated was that a conspiracy could not have continuance in time. It was urged that it could not, because it consisted in an unlawful agreement, and an agreement does not have continuance. That that was what it consisted in seemed to be justified by the common definition of a conspiracy as an agreement to do an unlawful thing, or to do a lawful thing by unlawful means. But this is no longer an accurate definition of a conspiracy. The agreement simply initiates the conspiracy, but it is not the whole of it. Mr. Justice Holmes said:

> [681] "It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it."

And again he said:

> "A conspiracy is constituted by an agreement, it is true; but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is the result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes."

Here we have an accurate definition of a conspiracy. It is "a partnership in criminal purposes," to which we might add, brought about by an agreement. So long, then, as the

partnership in a criminal purpose continues, the conspiracy continues. And it may continue without anything being done in furtherance of it. X and Y conspire on a day or two before the beginning of the period within which an indictment on a certain date may be found to murder Z, or to commit some other crime, on a day certain one week off; i. e., several days after the beginning of that period. After the beginning thereof, they abandon the conspiracy, either by a formal understanding or by allowing the day to go by without doing anything, and never renewing it. In such case the partnersship in the criminal purpose continues into the period. In so far, then, as it continued into the period it was not barred by the statute of limitations. The mere fact that the prosecution for the agreement which initiated the partnership is barred is no reason for barring it as to so much of the partnership as has continued into the period. It may be important to show something done in furtherance of the conspiracy within the period to establish its continuance into it. It is not essential to its continuance thereinto.

We come, then, to the question whether the Government was entitled to a submission of such case to the jury. This depends on whether there was substantial evidence in support of that case. By substantial evidence we mean evidence fit to induce conviction. And in determining this we limit ourselves entirely to the Government's evidence, for it is not the province of the court, on a motion for a peremptory instruction, to weigh the evidence. That is for the jury only, except that it may be weighed by the court on a motion for new trial. *Jenkins & Reynolds Co.* v. *Alpena Portland Cement Co.*, 147 Fed. 641, 77 C. C. A. 625.

[28, 29] In order for the defendants to have so conspired it is essential that they had such connection with the National Company that in the performance of their duties they had to do with its competitors. Those of its officers and agents who had nothing to do with competition, as, for instance, those in the manufacturing department, can not be said to have so conspired. It is not sufficient to connect any officer or agent of the National Company with the conspiracy that they knew of it or acquiesced in it. They must by word

Opinion of the Court.

or deed have become a party to it. *People* v. *Richards*, 1 Mich. 216, 51 Am. Dec. 85; 5 R. C. L. p. 1065.

[30] The president and general manager of the company had to do with competition. Both, the latter under the former, had supervision [632] of its entire business. They were located at Dayton. The United States was divided into sixteen districts. Over each was placed a district manager. Those district managers were located in the principal cities of the country. They had complete charge of the business in their respective districts, which included sales and competition. Sales were made by sales agents and salesmen distributed throughout the country; the latter being under the former, and both under the district managers. In making sales they were brought into contact with competition. There was a competition department, with a competition committee. This committee was located at Dayton. It had entire supervision of competition. It had executives who dealt with competition in the field, known as "company salesmen." They worked in conjunction with sales agents and salesmen, and when in the field were under the district managers. The nexus between the competition department and the president and general manager was the executive secretary. Besides these, there was a sales manager and assistant sales manager located at New York. They had more or less to do with competition. The district managers at times held conventions at Dayton. They were attended by the president and general manager, the members of the competition committee, the executive secretary, and the company salesmen. At these conventions the subject of competition was given prominence. The sales agents and salesmen at times held conventions in different parts of the country, and at these conventions competition was a subject of discussion. Some of these officers and agents—at least the president and general manager, competition committee, and district managers—took part in framing the policy of the company as to competition. And it would seem that most, if not all, of them knew of it and had a hand in carrying it out. The sales agents and salesmen [illegible] commission on their sales. All the others received [illegible]

All but three of the plaintiffs in error were connected with the National Company when the indictment was found, and most of them were connected in one or the other of the capacities above set forth, and had been so for some time. The plaintiff in error John H. Patterson was president; Edward A. Deeds, vice president and a director, and possibly assistant general manager; William F. Bippus, treasurer director; Robert Patterson, a director; Thomas J. Watson, sales manager; Joseph E. Rogers, assistant sales manager; Alexander C. Harned, executive secretary; Alexander W. Sinclair and John J. Range, company salesman; and Frederick S. High, Pliny Eves, Arthur A. Wentz, George E. Morgan, Charles T. Walmsley, Charles A. Snyder, Walter Cool, Myer N. Jacobs, Mont L. Lasley, M. G. Keith, J. C. Laird, W. C. Howe, and E. H. Epperson, district managers. It is not certain that the plaintiff in error Jonathan B. Hayward was then connected with the company; if so, it was as patent counsel. The plaintiff in error William H. Muzzy ceased his connection in 1911, and was then connected with the patent department at least as an attorney. Both Hayward and Muzzy had been members of the competition committee. And the plaintiffs in error William Pflum and Earl B. Wilson [633] ceased their connection in 1910; the one being general manager and the other sales agent. John H. Patterson had been president since 1884, and all the others had been connected with the company many years, though not in the same capacities in which they were then connected, and yet most of them in capacities which caused them to have to do more or less with competition.

We think it clear that there was substantial evidence to the effect that there was a conspiracy on the part of those officers and agents of the National Company who then had to do with competition against most, if not all, of the competitors named who were in existence before the American of Columbus came into existence, which was not later than the early part of 1907, except the Peninsular, Burdick-Corbin, and Dial, as long as they were in existence within the 20- ... that this conspiracy included the use of ... f the means specified, and other means not

specified aimed to be covered by the eleventh item, and that when that company came into existence there was a generic conspiracy against all competitors, at least all who might endanger the National's supremacy, which generic conspiracy had been in existence at least from the beginning of the 20 years. In an issue of a publication of the company seemingly for distribution amongst its officers and agents, of date May 1, 1892, occur these statements:

"If the opposition knew what is in store for them, they would not waste any more time and money staying in the business. They are all beginning to realize that there is no hope for them."

"It is only a question of whether we propose to spend the money to keep down opposition. If we continue, it is absolutely certain no opposition company can stand against this company and its agents. If necessary, we will spend five times as much money as we have already done, in order to down opposition. If they really believe this, they will throw up the sponge and quit."

"We are receiving overtures to buy out opposition. We will not buy them out. We do not buy out; we knock out."

In an issue August 1, 1895, occurs this statement:

"We are determined to absolutely control the cash register business."

And in an issue of date March 25, 1897, after setting forth the policy of the company of frankly informing a competitor of the purpose to drive him out of business, occurs this statement:

"This, it is true, is what is called 'securing a monopoly'; but we think there can be no possible economic or other objection to it. Cash registers are not a necessity of life. Any one who chooses can do business without them, thus contributing nothing to the 'monopoly.'"

It is then stated that "this monopoly" "is managed upon a liberal and broad-minded plan." And at a convention of the district managers held at Dayton July 22, 1907, the defendant John H. Patterson, president, thus expressed himself to them:

"We want Mr. Anderson of the competition department to give you a little idea of how we are going to control competition. We want Mr. Hayward also to give you a little talk. We want Mr. Muzzy to tell you how we are going to absolutely control the competition of the world, because we want you to feel this way. The first thing we aim to do is to keep down competition."

Opinion of the Court.

[684] And again:

"I asked the Standard Oil Company what was the secret of their success, and they said this question could be answered in a very few words. Men, nothing but men; men well organized; they will keep down competition and make things succeed."

In the publications of the company and in the communications between the officers and agents having to do with competition, terms of warfare were not infrequently used, such as battle, fight, enemy, ammunition, shot, whipped, victory, and flags flying. During that time all the competitors named then in existence retired from the field. The American of Philadelphia, Boston, Hallwood, International, Hubinger & Carroll, and Latimer quit. The National does not seem to have been the cause of the Latimer quitting. The Century, Chicago, Cuckoo, Globe, Ideal, Kruse, Lamson, Metropolitan, Navy, Osborn, Standard, Simplex, Sun, Toledo, Union, and Weiler sold out to the National, and it discontinued their business. The American of Philadelphia and Boston quit because of infringement suits brought against them by the National in which it was successful. The decisions in its favor against them are *National Cash Register Co.* v. *American Cash Register Co.* (C. C.), 47 Fed. 212; *National Cash Register Co.* v. *American Cash Register Co.*, 53 Fed. 367, 3 C. C. A. 559; *National Cash Register Co.* v. *Boston Cash I. & R. Co.*, 159 U. S. 261, 15 Sup. Ct., 1041, 40 L. Ed. 142. The result of this litigation may possibly have had something to do with other competitors quitting or selling out. Infringement suits were brought against most, if not all, the others, and these suits had more or less to do with their quitting or selling out. There was evidence tending to show in some of these instances at least that the claim of infringement was unfounded and known to be so, and that the suits for infringement were not brought in good faith, but for the sole purpose of aiding in driving the competitors from the field. The Government claims that such was the case in all instances. In most, if not all, of these instances, some, if not all, of the other means were resorted to, and it is not unlikely that in some instances at least they were more effective than the suits. And such means were resorted to

in some, if not all, the cases where the suits were successful. The Hallwood, International, Century, Chicago, Cuckoo, Globe, Ideal, Metropolitan, Navy, Osborn, Simplex, Sun, Toledo, Union, and Western retired from the field during the 7 years prior to 1907. Most, if not all, of the others retired before then, and mainly in the early part of the 20-year period.

In justice to the National Company and the defendants it should be noted that it was the pioneer in the cash register business and developed it. It owned the basic patents and must have acquired in a proper manner a very great number of improvement patents. In addition to this, it had the advantage of very great capacity in the management of its affairs. These two considerations together, without reference to any unfair treatment of its competitors, are sufficient in themselves to account in a large measure for the success it has attained. And it is not unlikely that its trade was pirated by other competitors besides the American of Philadelphia and the Boston, against whom it obtained [635] decrees of infringement, and that these, as well as others, in their competition with it, resorted to some of the tactics complained of here.

We think it clear, also, that there was substantial evidence to the effect that this generic conspiracy was directed against the American of Columbus when it came into existence, and became specific as to it, and that it continued up until just shortly before the beginning of the 3-year period. The only other competitors then in existence were the Peninsular, Burdick-Corbin, and Dial, neither of which, as stated, was of much consequence. That company was the successor of the International, and it in turn of the Hallwood. The Hallwood during its existence, which covered a number of years, was one of the National's most stubborn competitors. It went into the hands of a receiver in 1903 or 1904. There was evidence tending to show that an effort was made, whilst its assets were in such hands, by the National, to acquire them without its being known in the transaction. The International acquired them, and then the American. Its connection with the Hallwood not unlikely aided it in getting established in business soon after entering the field. So iden-

tified with the Hallwood was it that its machines were frequently called Hallwood, and it, sometimes, the Hallwood Company. In view of its connection with the Hallwood Company, one would expect the generic conspiracy to be directed against it as soon as it came into existence, and so the Government's evidence tended to show. May 4, 1907, the district manager at Detroit, Henry F. James, wrote to the assistant head of the competition department, Joseph E. Warren, that the Hallwood (i. e., American) situation in Detroit looked rather serious, and suggested the employment of the plaintiff in error Alexander W. Sinclair, then off the roll, to hire the Hallwood agent at that point. Warren answered that the competition did not warrant placing Sinclair on the roll again, and suggested that he (James) was in a better position to hire the agent than Sinclair. There was no evidence of anything else of a specific character during this year. But there were general statements as to competition which could not have had reference to any one but the American. Such was the statement of plaintiff in error John H. Patterson, at the convention of district managers July 22, 1907. June 20, 1907, the general manager, Hugh Chalmers, wrote to all the sales agents and salesmen, suggesting that they call on the users of competing machines and point out to them the weaknesses and deficiencies thereof, so that, even if they could not make a trade, they would cease to be a "plugger" for the opposition. And September 6, 1907, the head of the competition department, C. D. Anderson, wrote James at Detroit that the company was never in better shape to take care of competition than at that time, and for that reason they did not intend to let it increase again.

March 1, 1908, the plaintiff in error Sinclair entered the employ of the American and located at Detroit. It is possible that he was then still off the National's roll. He continued in its employ there until September 24, 1908. During this time a vigorous effort was made to drive him from the field, and it finally succeeded, when he reentered the National's employ as a company salesman, and so continued until [636] the trial. The plaintiffs in error Pflum, then general manager, Harned, then executive secretary, and Watson, then sales manager, participated in this effort. The method

Opinion of the Court.

of attack was to prevent him from making sales of American machines and to displace such as he made. The way in which the former was attempted was by offering Hallwoods owned by the National Company at low prices—i. e., 30 cents on the dollar—in competition. The intention was to construct a machine specially for that purpose. In letter from James to Harned of date March 16, 1908, he stated that he needed a proper tool with which to fight Sinclair's competition, and requested that 10 or 12 Hallwoods be sent him, "as our machine parallel to Hallwood will not be ready for some time," and Harned in his answer said that work on draw-operated machine—which was the character of the American—was being pushed and they would be able to give it to him sooner than he had stated. But whether this machine was used in this connection does not appear. The way in which the displacements were brought about was by offering the regular National machines on unusual terms. Both methods were unfair. Their purpose was to drive Sinclair and the American which he represented off the field, so that the National might have it to itself. May 16, 1908, Harned wrote James, congratulating him on displacing six Hallwoods taken in part pay for six Nationals, and stated that all at the factory, including plaintiff in error Deeds, were pleased and gratified at the outcome, and that he had put a crimp in Sinclair from which he would have difficulty in recovery. June 9, 1908, James wrote Pflum that since Sinclair had taken hold he had blocked 25 of his sales and displaced 9. September 4, 1908, plaintiff in error Watson issued a circular to the selling force empowering them to sell Hallwoods at 30 cents on the dollar. There was evidence of unfair means being used during this same time at Los Angeles to prevent the sale of the American machine, the details of which need not be given. And September 10, 1908, James, in whose territory Grand Rapids, Mich., was located, wrote plaintiff in error Watson, wanting to know the conclusions of himself and plaintiff in error Pflum as to the situation at that place, and whether they had succeeded in hiring Cleaves, the agent of the American, and [illegible] that if they could not hire him, they should have [illegible] —i. e., company salesmen—there [illegible] of business.

Opinion of the Court.

After Sinclair returned to the service of the National, he was sent to Toledo, Ohio, where he remained at least until in November, 1908. Whilst there he adopted the same tactics that had been used against him in Detroit to drive out the agents of the American at that point. Finally, in the middle of January, 1909, James, the district manager at Detroit left the service of the National, and in breach of a contract that he had with it at once entered the employ of the American and was placed in charge of several States, with headquarters at Detroit. In the early part of February, 1909, certainly not as late as the 22d of that month, the new district manager appointed to take the place of James at Detroit was installed. At a meeting of the sales agents and salesmen who were to be under him, held on that occasion, the plaintiff in error Watson was present and undertook to outline the policy [637] of the National in meeting competition, and in the course of his remarks, according to one witness, he said that it would be necessary to use every means possible to put James out of business, and according to another that they did not want him to get a foothold in Detroit, and that they would move their executive offices to Detroit, but that they would put him out of business.

Thus it is that the Government's evidence tended to establish a conspiracy on the part of some of the defendants at least against the American, and brought it down almost to the door of the 3-year period. It remains to consider whether there was substantial evidence to the effect that it entered that door. Possibly in view of the fact that the American was still actively in business—that what had transpired preceding the 3 years down almost to it indicated an absolute and fixed purpose to restrain the trade of the American, if not to drive it out of business, without any indication of a change of purpose before the 3 years—and that the American was represented at Detroit by the National's former representative, against whom it had a grievance, it was for the jury, without more, to determine whether the conspiracy continued into the 3 years. But the case does not depend upon presumptions. Things were done within the 3 years by representatives of the National in restraint of the American's trade and commerce. According to the defend-

ants, all that was done was by sales agents and salesmen, and none of the plaintiffs in error were directly connected with it; and what was done by sales agents and salesmen was scanty, in view of the fact that the National had 750 of such representatives distributed throughout the country, and the American was doing business all over it. They urge that what the Government's evidence established was done should be taken as being all that was done. The American knew of all unfriendly action towards it, and actively assisted it in the prosecution of the case, and the evidence disclosed that it made a very thorough investigation. Here, according to defendants, was all that was done. In 22 instances sales agents and salesmen of the National attempted to induce purchasers of American machines, who had not paid for them, to repudiate their contracts by seller's talk and offering to allow them what they had paid on the purchase price of Nationals, in two, and possibly three, of which instances the attempt was successful. They occurred in 14 different States and 17 different localities. Ten of them occurred in 1909, 7 in 1910, and 5 in 1911. Defendants would have it that these were all such instances, but the tendency of the testimony of Steubenrauch is to establish 8 others, 6 of which were in 1910 and 2 in 1912, in Connecticut. In addition to these the acts in restraint covered by the Government's evidence were the display in March, 1909, by the National's sales agent at Los Angeles, in California, in his show window, smashed-up Hallwood cash registers with a card bearing this inscription:

> "Hundreds of merchants have exchanged unsatisfactory Hallwood cash registers for Nationals. We sell them at 30 cents on the dollar. But as they have no commercial value and do not sell, we are compelled to break them up to make room and will sell as Old Junk."

—an unsuccessful attempt by the sales agent of the National at Dallas, Tex., in the winter of 1909–10 to bribe a drayman in the employ [638] of the American agent to tell him where he delivered every American machine, and an unsuccessful attempt by the sales agent of the National at Los Angeles, Cal., May 1, 1910, to induce the American agent at that point to leave its employ and enter that of the National. The defendants contend that it is more reasonable to account for these acts by a desire on the part of

the sales agents and salesmen to make commissions than the existence of the conspiracy charged. Undoubtedly these acts are small in number compared with the number which might have been, and it is possible to account for them on the grounds suggested. And the fact that James, the most important witness for the Government, did not definitely testify to any specific acts in restraint of his trade after he became connected with the American is favorable to the defendant's position. But even on the basis that the foregoing list exhausts all acts in restraint of the trade and commerce of the American within the 3 years, and that these are to be accounted for, as defendants would have it, or as mere sequelæ of a conspiracy that terminated before the beginning of the 3 years, still we are constrained to hold that it was for the jury to determine whether the conspiracy continued into the 3 years. We have shown that the Government's evidence tends to establish the continuance of the conspiracy almost up to the very beginning of the 3 years. Something happened shortly after the beginning of the 3 years calculated to terminate the conspiracy, which may account for nothing being done by the defendants in error within the 3 years indicating the continued existence of the conspiracy, and which, if it was the cause of its termination, involves its continuance into the 3 years. That was action on the part of James to call the National to account for its attitude towards and action against the American. On July 14, 1909, an information in the nature of a quo warranto on behalf of the people on relation of James was filed in the Supreme Court of Michigan against the National Company to oust it from that State for violating its anti-trust laws, which proceeding resulted in a judgment for a fine on July 14, 1914. In the nature of things, some time must have been taken to prepare for the proceeding, and the evidence disclosed that James caused affidavits to be taken of unfair acts towards the American by National agents as far back as in March, 1909. It is not unlikely that the National became aware of this contemplated proceeding, and knowledge of it was calculated to cause it to take steps to end all action against the American which could reasonably be complained of. And

Opinion of the Court.

we find that on April 1, 1909, the plaintiff in error Pflum sent the following letter to all the district managers, to wit:

"THE NATIONAL CASH REGISTER COMPANY,
"*New York, April 1, 1909.*

"TO ALL DISTRICT MANAGERS:

"Mr. M. N. JACOBS: In the various conventions I have attended, I found that some of the newer members in the districts are not thoroughly clear on the best way to handle sales made by other companies. Please see that every agent in your district thoroughly understands our position in the matter.

"You know what this policy is, but in brief will say that in no case will we permit any of our agents to misrepresent cash registers manufactured by other companies, neither will we permit any agent or person in our employ to induce any purchaser of a cash register made by any other company to break [639] his contract and return the register to the manufacturer. With the line of registers that our agents now have, they are able to show the superiority of Nationals over those of any other make and at lower prices.

"There has been no violation of our policies that I know of, but I give you this information because of the inquiries received from the newer men in the field.

"Please see that these instructions are carried out in every detail and that the new men are so instructed on entering the field.

"Yours very truly,

WM. PFLUM,

"W. P.—T. *Vice President and Manager.*"

There is room to claim that such is the only reasonable ground to account for this letter being written and sent out. If so, there is room to claim, further, that the conspiracy continued at least until then.

[31] But we would not be understood as holding that, apart from this construction, the acts in restraint of the American's trade within the 3 years above given were not sufficient, in connection with the evidence tending to trace the existence of the conspiracy up to the beginning of the 3 years, to require that the question as to its continuance within the 3 years be submitted to the jury. The question is not whether those acts were sufficient to establish the entering into a conspiracy in the first instance, but the continuance of a conspiracy theretofore [illegible] that list cannot be said to be exhaustive. [illegible] noted that James in his letter to [illegible] and Harned in his

answer, referred to a drawer-operated machine parallel to the Hallwood (i. e., American), which the National was making for the purpose of fighting the American therewith. The Government's evidence tended to show that a machine known as 1,000-line machine, and which not unlikely was this machine, was used only for the purpose of fighting the American and keeping it from making sales within the 3 years. If so, this could hardly be without some of the defendants being connected with it. The Government's position here was combated strongly by the defendants, but we cannot weigh its evidence on this point as against that of the Government. For these reasons, therefore, we think the case was for the jury, and the court did not err in overruling all the motions. It is not the province of an appellate court to weigh the evidence. What the trial court might do on a motion for new trial as to some of the defendants, in the view which we have taken of the nature of the offense charged, we need not pause to consider.

4. It is now in order to take up the assignments questioning rulings upon the admissibility of evidence. They are very numerous, but the consideration of them can be shortened by classification. In considering them, the case for the jury, as we have determined it to have been, should be kept constantly in mind. That case is whether within the three years the defendants conspired in restraint of the trade of the American of Columbus, by the use of the fifth and ninth means. No evidence that was not relevant thereto was admissible, and all that was was admissible, if not otherwise objectionable. The primary classification of these rulings is into those involving evidence that was admitted and those where the evidence was excluded. We consider first those where the evidence was admitted. In this connection it may be said generally that the admissible evidence was not confined [640] to that which bore directly upon the existence of such conspiracy within the 3 years. All that was not otherwise objectionable tending to show the existence of a generic conspiracy when that company came into existence and its fixed and absolute character was relevant and admissible. Likewise as to all evidence tending to show that

upon its coming into existence the generic conspiracy was directed against it specifically and continued down to the beginning of the 3 years.

The admitted evidence involved in the rulings covered by the assignments relates to transactions within the 3 years and to transactions prior thereto as far back as the beginning of the 20 years. Here we consider first that which relates to transactions within the 3 years. And that may be divided into the evidence of the acts in restraint of the American trade, heretofore referred to, evidence of an act against that company, not heretofore referred to, and evidence of acts against the Michigan and Dial companies.

[32] All of the evidence of acts against the American, heretofore referred to, was objected to, and the rulings admitting it are assigned as error. It is urged that none of those acts come within the means specified in the indictment, and that the eleventh item is insufficient, under the authority of the case of *United States* v. *Greene* (D. C.) 115 Fed. 343, 346. We think, however, that they fairly come within the fifth and ninth. Greater stress is made on the consideration that it was not shown that any of the defendants were connected with any of those acts. It is true that there was no direct evidence of such connection, apart from the use of the 1,000-line machines; but this circumstance did not render evidence of those acts inadmissible. The Government would base its admissibility on the doctrine of respondeat superior. It cites the cases of *United States* v. *Gooding*, 12 Wheat. 460, 6 L. Ed. 693; *Cliquot's Champagne*, 3 Wall. 114, 18 L. Ed. 116; and *Stockwell* v. *United States*, 13 Wall. 531, 20 L. Ed. 491, where it was held that:

> "Whatever is done by an agent in reference to the business in which he is at the time employed and within the scope of this authority is said or done by the principal, and may be proved as well in a criminal as in a civil case in all respects as if the principal were the actor."

But this doctrine can have no application here, as the persons who did the acts—i. e., sales agents and salesmen—were not the agents of the defendants. They were the agents of the National Company. They were under defendants, but this did not make them defendants' agents. It urges further

that they were co-conspirators with defendants, and under the case of *Clune* v. *United States*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269, what one conspirator does is evidence against the other, even though he is not a defendant or charged with being a party to the conspiracy in the indictment. Possibly this is sufficient to uphold the action of the court in admitting the evidence. But it is not necessary to rely on it. All the acts were done in the regular course of the business of the National Company. Those sales agents and salesmen were under the direct supervision of some, at least, of the defendants. There was substantial evidence that [641] prior to the 3 years the defendants were in a conspiracy to restrain the trade and commerce of the American of Columbus by causing such acts to be done, and the sole question was whether that conspiracy had continued into the 3 years. The doing of those acts was relevant to that issue. It was not an unreasonable inference that they were to be accounted for by the continued existence of the conspiracy. Possibly they are to be accounted for by the initiative of the sales agents and salesmen in their anxiety to make commissions or as mere sequelæ. But it was for the jury to determine how they were to be accounted for as between those three possible ways of doing so. The defendants contend that is a case of an inference upon or from an inference, and that this is not allowable under the cases of *United States* v. *Ross*, 92 U. S. 281, 23 L. Ed. 707, and *Manning* v. *Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761. That is a case of an inference upon or from an inference is attempted to be made out by tracing the course of inference in this way. An inference is first drawn that the sales agents and salesmen acted upon the instructions of the National Company, and then the further inference is drawn that defendants were connected with such instructions. This case does not involve any such question. It is a case of immediate inference. The course of inference is not as claimed, but from the acts done to the conspiracy as the cause thereof. The court, therefore, did not err in admitting the evidence.

[33] The evidence of an act against the company not heretofore referred to was as to something that happened in

connection with one of the attempts on the part of the National's sales agents and salesmen to induce purchasers of American machines to repudiate their contracts of purchase, to wit, the attempt as to Conrad Green & Sons, of Portland, Oregon, in the latter part of 1910. The agent of the American, who made that sale, left its employ the latter part of March, 1911, and entered that of the National. Evidence was admitted that after the delivery of the machine it was noticed to be out of order. The American agent made repeated attempts to fix it, but it remained out of order until he quit its employ. After he left, his successor, a repairman, who with the agent had examined the machine before its delivery and found it to be in perfect condition, examined it again and found that it was out of order because a piece of its mechanism was bent. The Government's position was that the American agent had bent it, at the National's instance. There was no other evidence that the National had any other connection with the matter than that the American agent entered its employ four or five months afterwards and one of its competition men was seen in his store about three weeks before he did so. We do not think the evidence was sufficient to connect any National agent with the defective condition of the machine. There was no evidence of any other such act having ever been committed or attempted against the American. We, therefore, hold that there was error here.

[34, 35] The acts against the Michigan and Dial, evidence of which was admitted, were these: A salesman of the National attempted to induce a dealer in Michigan cash registers, who bought them out[642]right from the Michigan Company and resold them, to discontinue the business by threats of interference. A similar transaction to this took place prior to the three years, i. e., in 1908. As to the Dial in one instance an agent of the National happening in the office of that company when an acquaintance was there negotiating for some of its stock advised him not to buy it; and in another the plaintiff in error Muzzy attempted to purchase the business or patents of the company which was unsuccessful. We think the court erred in admitting this evidence. The Government does not contend that the evi-

dence as to the Dial was sufficient to make a case for the jury of conspiracy against it, and we have held that that as to the Michigan was not sufficient for that purpose. If this evidence did not tend to establish a conspiracy against those companies, it did not tend to establish one against the American.

[36] We come now to the evidence as to transactions prior to the three years as far back as the beginning of the twenty years which was admitted over defendants' objection and the rulings as to which are assigned as error. The bulk of the evidence relates to such transactions and most of it was objected to. If the admission of any of the evidence as to acts against the American prior to the three years which, we have theretofore stated, is assigned as error, the assignment has escaped us. The admission of the evidence as to the other act against the Michigan is assigned as error. This assignment is well taken for the reason given as to the act within the three years. The rest of the assignments here have to do with evidence tending to show a conspiracy against the competitors who ceased to exist prior to 1907 and a generic conspiracy which was directed against them. The same objections are made to some of this evidence which were made to the evidence of the acts against the American within the three years heretofore set forth. It is urged that the transactions to which it relates do not come within the means specified and the eleventh item is not sufficient to warrant evidence of them under the Greene case. And the defendants were not shown to be connected with or responsible for them. It is also urged as to the evidence relating to transactions and matters occurring in the early part of the twenty years that they were too remote. We think, however, that none of it was too remote. It, as well as the evidence of later transactions and matters, tended to show a generic conspiracy and bore on its fixed and absolute character and on its nature otherwise. As to defendants' connection therewith they all occurred in the regular course of the business of the National, and whether [illegible] efendants and which of them were connected [illegible] open to inference to be drawn by the jury.

Opinion of the Court.

[37] Nor do we think the objection to certain of this evidence that it did not relate to transactions coming within the means specified well taken. The ruling of the court in refusing to require a bill of particulars of the means intended to be covered cannot be questioned here and the indictment was quite liberal in the matter of specification. Besides, the case for which the defendants were subject to conviction was limited to means specified, to wit, fifth and ninth. The [643] question here is whether in establishing the generic conspiracy—a fact relevant to the existence of the specific conspiracy covered by that case—the Government was limited to the means specified as to competitors who ceased their existence prior to 1907. The tendency of the use of other means than those specified was to establish that the generic conspiracy was to use every possible wrongful means that might be effective in putting an end to competition.

[38] Special emphasis is made upon the assignments which call in question rulings admitting evidence concerning the purchase of the businesses of 16 competitors by the National prior to 1907, and how the purchases came about. But all this evidence was admissible. Its tendency was to establish a generic conspiracy to compel competitors to sell out to the National by the use of any effective wrongful means in existence when the American came in the field, and the tendency of such generic conspiracy is to establish a specific conspiracy against the American when it came into existence, which continued into the 3 years, at least to restrain its trade and commerce, if not to compel it to sell out to the National, by the use of the fifth and ninth items. It is true that, at the time of these purchases, suits for infringement were pending against most, if not all, of these competitors. If such suits were brought in good faith and were the cause of the competitors selling out, then the tendency of that evidence was not to establish such a generic conspiracy. The case of *Virtue* v. *Creamery Package Company*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. 393, was an action for treble damages under the seventh section of the Anti-Trust Act for a conspiracy in restraint of the plaintiff's interstate trade by prosecuting suits against them for infringement of patents

and circulating reports that his articles were an infringement thereof. Two suits for infringement had been brought, in one of which infringement was denied and in the other decreed. In connection with those suits such reports were circulated. It was held that no recovery could be had. Mr. Justice McKenna said:

"Patents would be of litle value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal. Patent rights, it is true, may be asserted in malicious prosecutions as other rights * * * may be. But this is not an action for malicious prosecution. It is an action under the Sherman Anti-Trust Act for the violations * * * of that act, seeking treble damages."

He did not mean by that that no recovery could be had under that act for damages caused by a conspiracy in restraint of interstate trade by the malicious prosecution of suits for infringement. He meant no more than that it did not appear that there was any such conspiracy in that case. So far as appeared, both suits were brought in good faith.

But here there was evidence tending to show that suits were not brought in good faith, and, on the contrary, were an "illicit use of the courts as instrumentalities of oppression," condemned in the case of *Commercial Acetylene Co.* v. *Avery Portable Light Co.* (C. C.), 152 Fed. 642. Besides, there was evidence tending to show in certain of the cases, at least, that the bringing of the suit was not [644] the real cause of the competitors selling out, but the use of other wrongful means. In addition to this, in each case of purchase it was made a provision in the contract that the competitor should not engage in the cash register business for 20 or 25 years, except one or two States in the West, where the cash register business was not large, which evidenced the purpose to keep competitors out of the business. This circumstance made what is known as the Leland contract, settling litigation growing out of the suit against the Boston Company, in which the National was successful, admissible in evidence. After the end of that suit the National brought suits against certain officers of the Boston to recover damages. In the case of *National Cash Register Co.* v. *Leland*,

94 Fed. 502, 37 C. C. A. 372, it was held that it was entitled to recover, and this is the litigation in settlement of which the contract referred to was executed. By it the National acquired patents, models, and certain apparatus of the Boston Company. It contained a provision by which the officers were not to engage in the cash register business for 25 years, except in Montana and Idaho. There was no error in admitting any of these contracts in evidence.

[39] The admission of contracts with others than the competitors named in the indictment, eliminating them from the cash register field, is also assigned as error. There were five or six instances of this kind. The parties with whom the contracts were made were mainly dealers in second-hand registers. They evidence a purpose to acquire complete control of the business in second-hand registers of its make, and were admissible as tending to show a generic conspiracy and its character, notwithstanding they were not referred to in the indictment.

[40] The ground of objection to the evidence thus far considered is at bottom want of relevancy. Except to the extent stated we have found it to be relevant. In addition to these portions of the evidence, the admission of certain other evidence is assigned as error on the ground of its being hearsay. It is evidence as to what took place at two conventions of district managers held at Dayton, one in December, 1902, and the other in July, 1907. We have made use of what was said by the defendant, John H. Patterson, at the last of the two. What took place at these conventions was evidenced by what purported to be minutes thereof. Those of the first convention were identified by a witness who had been assistant to the head of the competition department and was present at it. He further testified that the minutes were taken by stenographers, amongst whom was the plaintiff in error, Harned, who took most of them, and that he thought a copy was sent to each district manager, and several were kept in the competition department. Those of the last one were identified by the former district manager [illegible] He testified that they were sent to him by the [illegible]pany with his name on it. It is not clear [illegible]s to be unde[illegible] as testifying that he was

present at the convention. Two objections are made to that evidence. One is that both were copies, and the originals should have been produced or accounted for. The other is that the evidence of what took place at those conventions was hearsay. The first ob[645]jection was not made in the lower court. That raised by the other was that before the minutes were read in evidence their accuracy should have been guaranteed, either by the persons who made them or by others who were present at the conventions. Strictly speaking, the objection that the evidence was hearsay raised this question. But the objection should have been more specific. It should have been expressly urged that such guaranty should be made before admitting the minutes in evidence. It might have been furnished. Because of this, if any error was committed in admitting these minutes in evidence, it cannot be considered.

[41, 42] This brings us to the assignments questioning rulings excluding evidence offered by the defendants. That mainly complained of is the rejection of evidence offered to prove that the National owned unexpired patents covering the machines made and sold or offered to be sold, by the 16 competitors whom it bought out, by the Hallwood, International, and Hubinger & Carroll, which quit business, and by the American of Columbus, during the times they were in existence, which machines, therefore, infringed those patents. According to this offer, all the competitors who ceased business prior to 1907, and the American of Columbus, against whose trade and commerce defendants are charged with conspiring, were infringers of the National's patents, and in so conspiring they were but seeking to prevent them from doing that which the National had a right to have them refrain from doing. We are not much impressed with the good faith of the offer as to the American. The conduct of the National and its managing officers during the five years of its existence preceding the indictment seems to belie it. During that time no suit for infringement was brought against that company, except the one heretofore referred to, and there is no indication that they then thought that it was liable to such suit. It is not likely that they

would have remained quiescent in this regard, if they so thought. Because of the absence of any evidence to this effect, we have held that the conspiracy as to that company, if there was one, did not include the sixth and seventh means. But, assuming that the cffer was made in good faith, we think the court was right in excluding the evidence. It could not have been admissible to meet a charge that it had in bad faith threatened to bring suits for infringement. There was no such charge to meet. The only possible ground for its admissibility was to make good that defendants had the right to conspire in restraint of the interstate trade and commerce in cash registers of the American by the use of the fifth and ninth means, and hence were not guilty of an offense under first section of the Anti-Trust Act in so doing.

This brings before us the question whether a patentee and another, or the officers and agents of a patentee, can conspire in restraint of the interstate trade or commerce in the article covered by the patent of persons who have no right to engage in such trade and commerce, and who by engaging therein infringe the right of the patentee; i. e., whether such a conspiracy comes within that section. Its disposition involves the rights of a patentee. These rights are two, one statutory [646] and the other at common law. The statutory right is usually stated in its adjective form; i. e., to exclude or to prevent others from making, using, or selling the article covered by the patent, or, in other words, to sue or to bring actions against others who are or have been making, using, or selling them. But this right has also a substantive form. It is that others shall refrain from making, or using, or selling the article. The patentee's right at common law is to make, use, or sell the article. This right is to no extent dependent on the statute. The patentee, therefore, has the right to have others refrain from selling the article covered by his patent, and if they will not do so he has the right to prevent them from selling by suit. Has a patentee, then, the right to prevent any i[illegible] from selling the article covered by his patent [illegible] He certainly has no right to do it [illegible]stroying his factory, or such infringing [illegible]own. In sell-

ing the infringing article, no assaults are made upon his person, so that there is no room for claiming that his action was in self-defense. And the infringer owns his factory and articles. The patentee may be entitled to a destruction of the infringing articles through the process of the court, but not otherwise. But has he the right to prevent him from so doing by action outside of the courts, not involving an invasion of the rights of person or property of the infringer; i. e., by the use of means which would be wrongful if used by him to prevent another from selling articles not covered by his patent—i. e., such means as are charged here?

We are not concerned here with the question as to what a patentee may himself do in a general way to protect the substantive right which he has from invasion. The question in hand is whether he and another, or his officers and agents in his interest, may conspire to prevent an invasion of his rights in the interstate field by the use of any such means. This depends solely on whether such a conspiracy is within the first section of the Anti-Trust Act. And it would seem that to ask this question is to answer it. The terms of the section are of a most sweeping character. It includes every conspiracy in restraint of interstate trade or commerce. It is not a question whether it is rightful or wrongful interstate trade or commerce that is covered by the conspiracy. It is sufficient that it is interstate trade or commerce. If two or more persons in no way interested in a patent were to conspire in restraint of the interstate trade or commerce of an infringer, no one would contend that the conspiracy was not covered by the statute. No more is it open to contend that a conspiracy by a patentee and another, or by the officers and agents of a patentee in his interest, to restrain the interstate trade or commerce of an infringer, is not within the statute. The intent of the statute was to sweep away all conspiracies in restraint of such trade or commerce, whatever their character may be. The statute respects the monopoly of the patentee. It to no extent invades the rights conferred upon him by his patent. *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *United States v. Winslow*, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481. But the right to conspire with **[647]** another or others in his interest in restraint of the interstate

trade or commerce covered by his patent is not one of the rights conferred thereby, and such a conspiracy is within the statute. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107. Mr. Justice McKenna there said:

> "Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibitions. The Sherman Law is a limitation of rights—rights which may be pushed to evil consequences, and therefore restrained."

We are therefore clearly of the opinion that the defendants were not entitled to offer evidence that the trade and commerce of the American of Columbus in cash registers was covered by an unexpired patent owned by the National.

[43] How, then, as to the competitors who ceased to exist prior to 1907, and who either sold out to the National or just quit doing business? Was evidence that their trade and commerce was covered by unexpired patents so owned admissible? We think it was. As to them the question before the jury was not whether the defendants had the right to conspire in restraint of their interstate trade or commerce. The defendants were not on trial for any such conspiracy. The right to prosecute them for such conspiracy had been long before barred by the statute of limitations. But the question was before the jury whether they had conspired against those competitors to restrain their interstate trade or commerce by threatening to bring and bringing in bad faith suits against them for infringement of patents to compel them to sell out to the National or quit the business. It was the position of the Government that they had so conspired, and there was evidence tending to establish that they had, at least as to some of them. This was not an ultimate question in the case. It was only a subordinate one, and yet it was a real one. It was not primarily subordinate to the question whether the defendants had [illegible] traint of the interstate trade or commerce [illegible] Columbus by the use of such [illegible] was no such question in the [illegible] ordinate to the question wh[illegible] e Americ[illegible] into ex-

istence, the defendants were parties to a generic conspiracy in restraint of the interstate trade or commerce of all competitors who might endanger the supremacy of the National by the use of any effective means, of which a conspiracy against the American of Columbus by the use of the fifth and ninth means, which continued into the 3 years, was the outgrowth.

Now, as bearing on that question, we think that the defendants were entitled to prove, if they could, that the machines of those competitors were infringements. The means covered by the seventh item were in effect malicious prosecutions against those competitors—the bringing of suits for infringement, not in the belief that the National had a good cause of action against them, but without regard to whether it had or not—in order to drive them from the cash register field; i. e., in bad faith or without probable cause. A suit for malicious prosecution cannot be brought until the termination of the prosecu[648]tion. In such a suit, therefore, it is never a question whether there was real cause for the prosecution. Its dismissal settles the question whether there was real cause. But it is a question therein whether there was probable cause. The suit cannot be maintained if there was. But here there was no termination of the suits for infringement, by a decision of the question of infringement involved therein. In most instances the suits were terminated by settlement. The question, therefore, whether there was real cause for bringing them, is still an open question. And if there was real cause for their bringing, they were not malicious prosecutions—they were not brought in bad faith. If in an ordinary suit for malicious prosecution it is a good defense that there was probable cause for the prosecution, so here the claim that these infringement suits were brought in bad faith is met by showing that there was real cause for them, in that the competitors were infringers of valid unexpired patents held by the National. The defendants were not limited to showing that the National acted on the advice of counsel in bringing the suits. They had the right to show, if they could, that such suits were based upon valid patents against real infringers. It is true that the effect of this is to bring into this prosecution a considerable number of patent suits as it were. But the Government

has brought them here by charging in the indictment that defendants conspired to drive these competitors from the cash register field by maliciously bringing suits for infringements of patents against them, and introducing evidence to that effect. We think, therefore, that the evidence was admissible, and that there was error in excluding it.

[44] It is also urged that the court erred in excluding evidence of competitive tactics and aggressions on the part of the National's competitors, offered by defendants. As we make it, this evidence related only to the Hallwood, the American's predecessor, and to Steubenrauch, the American's Connecticut sales agent; the conduct of the latter happening within the 3 years. We think this evidence was admissible. The relevancy of the Government's evidence as to a conspiracy against the Hallwood was in its bearing on the existence of a generic conspiracy and its character. The tendency of the evidence as to its competitive tactics and aggressions against the National was to make out that, in so far as there was a conspiracy against the Hallwood, it was due to provocation. Provocation, therefore, was a possible element in the generic conspiracy, and, if so, the fact of there having been no provocation on the part of the American, the remote successor of the Hallwood, would make it open to contend that the general conspiracy was never directed against it. It is in this way that it seems to us that the evidence as to the conduct of of the Hallwood bore on the question whether there was a conspiracy against the American. Then, as to Steubenrauch's conduct: The tendency thereof was to show that the conduct of the National's sales agent complained of was due to that conduct, and not to a conspiracy on the part of defendants against the American.

[45] Finally, the exclusion of the letters of plaintiffs in error High and Snyder to the plaintiff in error Pflum, of date, respectively, April [649] 5, 1909, and April 6, 1909, in answer to his circular letter of April 1, 1909, to the district managers, heretofore quoted in full, are assigned as error. In those letters these two plaintiffs in error stated

that the policy therein outlined had been pursued in their districts. We think the letters were admissible in evidence. They were written nearly 3 years before the finding of the indictment, and were a part of the *res gestæ*. *Hibbard* v. *United States*, 172 Fed. 66, 70, 96 C. C. A. 554, 18 Ann. Cas. 1040; *Harrison* v. *United States*, 200 Fed. 674, 119 C. C. A. 78; *Gould* v. *United States*, 209 Fed. 730, 126 C. C. A. 454. If there was anything in the circumstances then or theretofore existing affecting their good faith, they were for the jury to consider, just as it was for them to determine the good faith of the Pflum circular.

5. It remains to consider the errors assigned in connection with the charge to the jury. But few exceptions were taken to the charge which was given, and no assignment of error in this connection has been argued. We therefore pass these exceptions by. The court submitted all three counts to the jury. The defendants requested that the jury be instructed to find them not guilty on the second and third. In accordance with our holding as to the sufficiency of these two counts, the defendants were entitled to have the jury so instructed. The first count alone should have been submitted to them.

[46] The court clearly told the jury that the defendants could not be found guilty under that count unless they had conspired within the 3 years. This, of course, limited the case upon which they could be so found to competitors in existence during the 3 years. But defendants were entitled to have the jury instructed specifically that they could not be found guilty as to the competitors who ceased to exist before 1907. They asked specific instructions to this effect. These instructions were given as to 6 of them. They should have been given as to the other 20. That such instructions were given as to 6 made it more prejudicial that they were not given as to the other 20.

[47] The defendants also requested that the jury be specifically instructed that they could not be found guilty as to each of the 6 competitors who were in existence during the 3 years. They were not entitled to the instruction as to the American of Columbus. They were entitled to the instruc-

tion as to the other 5. There was no substantial evidence that within the 5 years defendants had conspired as to either of those 5 competitors. The instructions as to the Burdick-Corbin and Jewell were given. Those also as to the Peninsular, Dial, and Michigan should have been given. The defendants further requested that the jury be specifically instructed that they could not be found guilty of having conspired within the 3 years in restraint by the use of each of the 11 means specified. They were so instructed as to the fourth. They were entitled to have it instructed also as to the sixth, seventh, eighth, ninth, and eleventh. Whilst, as we have held, the first, second, and third means were non-effective, without more, and the evidence as to the conspiracy within the 3 years including either of those means was slight, yet such as it was the jury was entitled to consider in connection with that bearing on the fifth and **[650]** ninth means, and no instructions should have been given which could be construed as excluding that evidence. That it is reversible error to submit to the jury the question whether the conspiracy in question includes means of which there is no evidence follows from the decision in *Nash* v. *United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232. The grounds upon which we hold the court erred in not giving the specific instructions indicated appear in what we have had to say on defendants' right to a peremptory instruction. The giving of them would have presented sharply to the jury the only ultimate question before it, to wit, whether within the 3 years the defendants conspired in restraint of the interstate trade or commerce in cash registers of the American of Columbus by the use of the fifth and ninth means specified.

[48-50] The defendants also requested the giving of three instructions embodying certain general propositions as to what it was not unlawful for the defendants to do in their several capacities as officers and agents of the National, to wit:

(1) "To require the agents of their company to report the names of persons who had purchased cash registers from competitors, or

to secure samples of machines from time to time put on the market by competitors."

(2) "To sell or offer and try to sell National cash registers to persons who had bought and owned competing cash registers in exchange at such price as was satisfactory to the parties."

(3) "To compare by comparative demonstrations or otherwise competitive cash registers with National cash registers, for the purpose of demonstrating the superiority of the National cash registers, and thereby induce the prospective purchaser to purchase the National cash register."

No objection can be made to the last proposition, but the other two were too broad. They need qualification. It was unlawful for defendants to do as stated in the second proposition, if the doing thereof involved the purchaser and owner of the competing cash register breaking his contract with the competitor in any particular, or was done for the purpose of driving the competitor out of the cash register field. One competitor has the right to try to sell by fair means all of his goods that he can, and if the effect of his selling is to drive another competitor out of the field he is not to blame. But it is wrong for one competitor to want to drive another competitor from the field by unfair or illegal means, and to take steps to that end, so that he may have the field free from such competition and thereby be enabled to sell his goods.

Then, as to reporting purchasers of competing registers and securing samples, it all depends on the manner in which the information in the one instance and the samples in the other were obtained or secured. If in a proper manner, nothing unlawful was done.

We do not deem it necessary to consider the other requests asked and refused.

We are constrained, therefore, to reverse the judgment of the lower court and remand the case for a new trial and further proceedings consistent herewith.

Opinion of the Court.

AMERICAN TOBACCO CO. ET AL. *v.* PEOPLE'S TOBACCO CO., LIMITED.[a]

(Circuit Court of Appeals, Fifth Circuit. April 12, 1913.)

[204 Fed. Rep., 58.]

LIMITATION OF ACTIONS (§ 100)—DISCOVERY OF CONSPIRACY—ANTI-TRUST ACT—VIOLATION.—Where plaintiff sued defendants for conspiracy, consisting of an alleged unlawful agreement to injure plaintiff in its business, in violation of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), the period of limitation did not begin to [59] run until plaintiff discovered the existence of the conspiracy and its cause of action.[b]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480–493; Dec. Dig. § 100.]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the People's Tobacco Company, Limited, against the American Tobacco Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Junius Parker, of New York City, and *George Denegre*, *Joseph Paxton Blair*, and *W. S. Parkerson*, all of New Orleans, La., for plaintiffs in error.

Edwin T. Merrick and *Ralph J. Schwarz*, both of New Orleans, La., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN District Judge.

NEWMAN, District Judge.

This is a suit by the People's Tobacco Company, Limite[illegible] against the American Tobacco Company, Augustus Cra[illegible] and the Craft Tobacco Company, which was brought und[illegible]

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[a] For former opinion [illegible] Court of Appeals (170 F[illegible] 396), see volume 3, [illegible]

[b] Syllabus copyrighted, [illegible] ing Company.

the act of Congress of July 2, 1890, known as the "Sherman Anti-Trust Act" (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). The suit was for damages alleged to have been sustained by the plaintiff below, the defendant in error here, by reason of an unlawful agreement on the part of the defendant companies and Augustus Craft, who, it is also alleged, conspired to injure the People's Tobacco Company in its business. There was a verdict and judgment for the plaintiff.

It is unnecessary to go into the character of the action or the questions involved on the merits of the case to any great extent, because the recovery in the district court as to the liability and the amount is not questioned here. The judgment, which recites the amount of the verdict, and is for three times the amount of the same and for counsel fees, is as follows:

"Considering the verdict of the jury rendered in this cause on March 30, 1912, wherein the jury found in favor of the plaintiff and against the defendants, in solido, in the sum of $8,728.06, and considering the law in such cases made and provided (act of Congress approved July 2, 1890), it is ordered, adjudged, and decreed that the plaintiff, the People's Tobacco Company, do have and recover of and from the defendants, the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company, Limited, in solido, the sum of $26,184.18, being three times the amount of the said verdict rendered on March 30, 1912, by the jury herein, together with interest thereon at the rate of 5 per cent per annum from the date of this judgment. It is further ordered, adjudged, and decreed, in accordance with the act of Congress as aforesaid, that the plaintiff, the People's Tobacco Company, do have and recover of and from the defendants, the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company, Limited, in solido, the sum of $5,000 as reasonable attorney's fees herein allowed by the court to plaintiff in this cause. It is further ordered, adjudged, and decreed that said defendants be condemned to pay all the costs of this suit."

[60] The only question made on this writ of error is whether the suit was brought in time, the defendants pleading the prescription of one year under the law of Louisiana, and it is conceded that that is the prescribed time for such actions in Louisiana.

Opinion of the Court.

The original petition which commenced this proceeding was filed January 30, 1908, and it is claimed that the first knowledge the plaintiff had of the fact that the American Tobacco Company was interested with Augustus Craft and the Craft Tobacco Company in the business which resulted in the injury to the plaintiff was in December, 1907. It is claimed by the plaintiff that the time when it became aware of the fact that the American Tobacco Company had combined with Augustus Craft and the Craft Tobacco Company to injure it in its business is the period from which the prescription began to run. The contention here, on the part of the People's Tobacco Company, as we understand it, is that the combination and conspiracy between the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company was concealed by the latter companies, or, at least, that their business operations and their methods were of such character that they concealed themselves, and that such concealment would prevent the running of the statute.

The question of prescription here was made in several ways by the defendants in the court below, by their requests to charge, which were refused by the court. They are properly certified, making the question here clearly and specifically as to whether prescription began to run before the fact of the concerted action on the part of the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company was discovered by or became known to the People's Tobacco Company. The charge of the court on this question of prescription was as follows:

"When you have gotten that far, if you first decide the case on the question of conspiracy, approached the question of damages, and have determined that the petitioner is entitled to damages, then there is another question of fact for you to determine, and that relates to the defense of prescription. It is the law of Louisiana that acts, such as these, are prescribed in one year after they occur. But it is also the law that this prescription is suspended, has not effect or operation, during such [illegible] party injured does not know that he has been injured a[illegible] [illegible]ing a suit. That means, gentlemen, that it [illegible] [illegible] or the day that the petitioner

knows that he has suffered an actionable injury. That does not mean that it would begin to run if he merely knew his profits were falling off, or he knew they were falling off from the competition of the Craft Tobacco Company; but it would begin to run if he knew that the falling off or damage was caused by the competition to effect and in pursuance of an illegal combination in restraint of trade. In other words, from the moment he knew he could bring an action against somebody to recover his damages, although he might not have known who the person was, or he might not have known how he was going to prove his action, prescription would run, and after the lapse of one year his right of action would be barred. Therefore it is a question of fact for you to determine, in connection with this case, whether or not the plaintiff knew, or ought to have known, more than a year before this petition was filed, that he had suffered an actionable injury. The petition was filed on the 30th day of January, 1908, the citation was served the same day on all the defendants, and the allegation in the petition is that he did not know of this combination or its operation against him until the 10th of December, 1907, which, of course, is within one year. [61] So, if you find the allegation in his petition is correct, and it not offset by the evidence, or not disproved by the evidence, you will pay no further attention to the question of prescription."

Taking this charge as a whole, we think it fairly presents the question of prescription in this case. The particular language which we think renders the charge sound, if it is otherwise subject to criticism, is this:

"Therefore it is a question of fact for you to determine, in connection with this case, whether or not the plaintiff knew, or ought to have known, more than one year before this petition was filed, that he had suffered an actionable injury."

The court then proceeds to state that the petition was filed in January, 1908, and that the plaintiff alleges he did not know of the combination and its operation against him until December, 1907, clearly indicating, and saying to the jury, and so they must have understood, that if the plaintiff knew, or could have known, more than a year before the filing of its petition, of this unlawful combination against it, the plea of prescription would be good. The view of the court, as indicated by the charge, was that prescription did not begin to run until the People's Tobacco Company knew, or ought to have known, of the agreement or arrangement

called "a combination or conspiracy" on the part of the other tobacco companies against it. While it might have known that its profits were falling off, and that the competition of the Craft Tobacco Company was causing this, this could not give it a cause of action under the provisions of the Sherman Law, and until it discovered that it had a right of action prescription would not commence to run. We think this states substantially the law of the case, and is the correct view of the question of prescription.

Much of the argument here has been directed to the question as to whether the maxim "contra non valentem agere non currit prescriptio" is now a part of the jurisprudence of the State of Louisiana. The decisions of the Supreme Court of Louisiana are conflicting, and there might well be doubt, under those decisions alone, as to what is the correct view of this. In *Levy* v. *Stewart*, 11 Wall. 244, 20 L. Ed. 86, however, which was a case from Louisiana, reference is made in the opinion by Mr. Justice Clifford to the law of Louisiana on this subject, and especially to the maxim "contra non valentem," etc., as follows:

> "Recent decisions of the Supreme Court of the State are referred to by the defendant, in which it is denied that any exception whatever is allowed in any case, in the law of prescription, as to bills and notes. None of those decisions are founded upon any express enactment, and the reasons assigned for the conclusion are not satisfactory. They admit that the maxim 'contra non valentem agere non currit prescriptio' is a maxim of universal justice, but deny that it applies to causes of action founded upon bills and notes, chiefly because 'they are prescriptible against minors and interdicted persons as well as others,' which the chief justice of the court, in the case first cited, held to be an unsatisfactory reason for the conclusion, and in that view the court here entirely concurs."

This would seem to indicate that the Supreme Court of the United States recognizes the correctness of those decisions of the Supreme Court of Louisiana which consider this maxim still a part of the jurisprudence of that State.

[62] In *Bailey* v. *Glover*, 21 Wall. 342, 22 L. Ed. 636, in the opinion by Mr. Justice Miller, this is said:

> "In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that

Opinion of the Court.

where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party."

Afterward in the opinion the following is added:

"But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded on a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side."

This case of *Bailey* v. *Glover* has since been frequently recognized in decisions by the Supreme Court and other United States courts. In *Traer* v. *Clews*, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467, the court, in discussing the question involved here as to the suspension of the statute of limitations, where the facts on which the case was based had been concealed, said (115 U. S. 538, 6 Sup. Ct. 159, 29 L. Ed. 467):

"The case of *Bailey* v. *Glover* has never been overruled, doubted, or modified by this court."

Many other authorities to the same effect might be cited, but the foregoing are considered sufficient to establish the principle which must control here.

It is stated in this case, however, that the question of fraud or concealment of facts upon which the case is founded was not made in the District Court, or presented to the jury by the court. We do not think this material here. The fact of a combination and conspiracy between the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company had already been established in this case, and also the amount which the plaintiff was entitled to recover, embracing threefold damages and attorney's fees. The judge, in his charge, fixed the time when prescription should commence to run as the date of the discovery of the fact of the concerted action by the two defendant companies and Craft. It must be borne in mind that the course of the wrongful conduct, injurious to the plaintiff, was all this time concealed from the plaintiff, and this conduct and this concealment must nec[63]essarily be considered as a fraud on the plaintiff. The court, in its charge, evidently assumed that, if the jury had found that the plaintiff was not entitled to damages, it would be unnecessary for it to consider the question of prescription at all. Indeed, such is indicated in the charge itself. But if it found damages for the plaintiff, making the consideration of the question of prescription necessary, then they would have already found such conduct on the part of the defendants as would amount to a fraud on the plaintiff, and all it was then necessary for it to consider was when the plaintiff first ascertained the facts which formed the basis for the charge of fraud.

It is said, however, that the only purpose for concealing the connection between the American Tobacco Company and Augustus Craft and the Craft Tobacco Company was that the American Tobacco Company was on the "unfair list" of organized labor, and that if its connection with the Craft Tobacco Company became known it would bring about a boycott by union labor of the Craft Tobacco Company. The fact of the concealment of the combination between the American and the Craft Tobacco Companies and Craft is none the less a concealment, as we see it, so far as the suspension of the running of the statute against the People's

Tobacco Company is concerned. It is the lack of knowledge of the facts which would give it a cause of action, and its inability for that reason to bring suit, that tolls the statute.

It must be borne in mind all the time that the questions of combination and conspiracy between the two defendant companies and Craft to injure the plaintiff's business, and of the plaintiff's damages and the amount it is entitled to recover of defendants, have been settled in this case; also that it has been adjudged that there was a combination against the People's Tobacco Company, of which it did not know until within the prescriptive period. Why should not the prescriptive period in this case commence at the time the combination against the plaintiff was discovered? The Sherman Act gives the right to an action for conspiracy to injure the business of the plaintiff, such as was alleged, and such as we must consider to have been established in this case. No action could be brought by the plaintiff until he had knowledge of the facts which gave him a cause of action. We think the court below was right in holding as it did on this question.

This being the only question for consideration here, for the reasons given, the judgment must be affirmed.

UNITED STATES v. NEW DEPARTURE MFG. CO. ET AL.

(District Court, W. D. New York. March 12, 1913.)

[204 Fed. Rep. 107.]

MONOPOLIES (§ 31)—SHERMAN ANTI-TRUST ACT—VIOLATION—INDICTMENT—"ENGAGE IN CONSPIRACY."—Sherman Anti-Trust Act, July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), provides that every contract, combination, or conspiracy in restraint of trade or commerce among the several States is illegal, and that every person who shall make any such contract or engage in any such combination or conspiracy shall be guilty of a misdemeanor. Section 2 declares that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

Syllabus.

person or persons to monopolize, any part of the trade or commerce within the several States, or with foreign nations, shall be guilty of a misdemeanor. *Held*, that the phrase "engage in such combination or conspiracy," in section 1, was used in a broad sense, and included, not only such persons as initiated such a conspiracy, but also those who afterwards engage therein; and hence an indictment, charging that defendants were engaged in a conspiracy among themselves to control and monopolize interstate commerce in the manufacture and sale of coaster brakes among the several States, followed by an allegation of overt acts tending to effectuate the conspiracy, was not defective for failure to charge directly the formation and existence of the conspiracy, the words "engage in," as so used, signifying to embark in, take part in, or enlist in, meaning substantially the same thing as to conspire.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 31)—COMBINATION IN RESTRAINT OF TRADE—INDICTMENT—LAWFUL PURPOSE.—Where an indictment for violation of Sherman Anti-Trust Act, July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), charged that defendants were engaged in a combination and conspiracy to monopolize and control the trade in and manufacture and sale of coaster brakes in the United States, and that for this purpose defendants, in combination with an association, had committed certain specified acts tending to restrain competition among themselves, including the assignment of pretended patent license rights, tending toward the establishment of uniform prices for the products, and an agreement between them for non-competitive discounts to jobbers, dealers, etc., all of which were alleged to have been done with an unlawful intent to control the market, the indictment was not defective, on the theory that the acts charged were in perfect harmony with a lawful purpose.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 31)—SHERMAN ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF TRADE—PATENT RIGHTS—INDICTMENT.—In a prosecution of manufacturers of coaster brakes for combination in violation of Sherman Anti-Trust Act July 2, 1890, c. 647 §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), certain counts of the indictment alleged that defendant, the N. D. Company, was the owner of a basic patent for making such brakes, and issued licenses to manufacture thereunder, charging, however, that the defendant corporations were separately the owners of patents and patent rights for improvements in the coaster brake and other bicycle and motor cycle accessories, but that the defendants, to effectuate their plan

Syllabus.

to restrain trade, feigned the making of a license agreement ostensibly covering a part, but not the whole, of the coaster brake manufactured by the N. D. Company, charging that the pretended license agreements, which were to be en[108]tered into simultaneously by the N. D. Company as ostensible licensor with the remaining corporation defendants as ostensible separate licensees, were to be in all respects uniform in character, were to contain schedules of uniform and non-competitive prices, restrictions upon all sales, etc. *Held*, that such averments negatived an inference that the licenses were for a basic patent, but that the conditions were imposed on competitors in good faith and without an intention to violate the statute, since the fact that patents are issued to various persons or corporations, does not entitle them to combine to restrain the manufacture or sale of the patented article or to enhance prices in restriction of commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

STATUTES (§ 47)—VALIDITY—DEFINITENESS—SHERMAN ANTI-TRUST ACT.—Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), providing that every contract, combination, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is illegal, and that every person who shall make such contract or engage in such combination or conspiracy shall be guilty of a misdemeanor, and that every person or persons who shall monopolize or attempt to monoplize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, shall be guilty of a misdemeanor, is not unconstitutional because of indefiniteness.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.]

INDICTMENT AND INFORMATION (§ 87)—TIME OF OFFENSE—LIMITATIONS.—Where an indictment, charging a conspiracy in restraint of interstate trade or commerce in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), alleged that defendants continuously, during the period from July 1, 1907, to January 8, 1912, committed the unlawful acts specified, it sufficiently alleged that an offense was committed within the three-year statute of limitations.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.]

INDICTMENT AND INFORMATION (§ 99)—COUNTS—INCORPORATION OF PREVIOUS COUNTS—REFERENCE.—It is proper to incorporate in a subsequent count by reference facts alleged in a previous one.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. § 99.]

Opinion of the Court.

Indictment against the New Departure Manufacturing Company and others for alleged violation of sections 1 and 2 of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Demurrer to indictment overruled.

See, also, 195 Fed. 778.

John Lord O'Brian, of Buffalo, N. Y., for the United States.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y., *Gross, Hyde & Shipman*, of Hartford, Conn., and *Holmes, Rogers & Carpenter*, of New York City (*Delevan A. Holmes*, of New York City; *Wm. Waldo Hyde*, of Hartford, Conn.; *Lyman M. Bass*, of Buffalo, N. Y., and *Louis E. Hart*, of Chicago, Ill., of counsel), for defendants.

[109] HAZEL, District Judge.

The defendants, the New Departure Manufacturing Company and 5 other corporations and 18 individuals, have been indicted in eight counts for the violation of sections 1 and 2 of the Sherman Anti-Trust Act, passed July 2, 1890 (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), being charged with unlawfully engaging in a conspiracy in restraint of interstate trade and commerce among the several States and foreign nations, and with attempting to monopolize such interstate trade and commerce.

The indictment, to which the defendants have demurred, after charging in general terms that the corporation defendants were separately engaged in different States in the business of manufacturing bicycle and motor cycle coaster brakes and accessories, of a distinctive type and design from those manufactured and sold by any other of the corporation defendants, under certain letters patent and certain patent license rights owned by them separately, alleges that the individual defendants were officers of the said corporations, vested with power and authority to do and perform the unlawful acts and purposes of the conspiracy, with the

exception of Huntington and Jackson, who, however, were possessed of similar power and authority to accomplish the unlawful acts and purposes of the conspiracy by reason of their appointment as arbitrators of the association formed by the said corporations; that the defendants produced in the aggregate 85 per cent of the entire output of bicycle and motor cycle coaster brakes and accessories consumed in the United States, and had power, by association and co-operation, to fix and control the prices thereof in the United States markets. The indictment substantially avers that said corporations were separate and distinct entities, and should each have conducted its business in competition with the others as to prices, rebates, discounts, and conditions of sales, and that such businesses would have been free from unlawful restraint if the defendants had not engaged among themselves in the conspiracy complained of.

The direct accusation is that continuously from the 1st of July, 1907, down to the date of the indictment, the defendants unlawfully, knowingly, and with intent to do so engaged in a conspiracy among themselves in undue, unreasonable, direct, and oppressive restraint of interstate business, trade, and commerce. The first count of the indictment charges the defendants with engaging in a conspiracy among themselves to restrain interstate trade; the second, to restrain the interstate trade of their competitors; the third, to restrain the interstate trade of the corporation defendants and individual jobbers and manufacturers of coaster brakes; the fourth, fifth, and sixth counts detail acts of conspiracy without referring to the proposed patent license; while the seventh and eighth counts, after properly referring to the facts of the preceding counts, allege an unlawful attempt on the part of the defendants to monopolize the interstate trade and commerce in the said articles. A summary of the particular methods detailed in the indictment for effectuating the claimed conspiracy follows:

(1) By agreeing upon prices for the products manufactured by the corporation defendants, and maintaing them; (2) by establishing uniform and non-competitive discounts to be offered to manufacturers,

jobbers, and deal[110]ers; (3) by selling the manufactured product at non-competitive prices, rebates, and discounts largely in excess of the prices which would have prevailed if the defendants had not engaged in the conspiracy; (4) by refusing to sell coaster brakes except on the terms and conditions agreed upon by defendants; (5) by agreeing upon a form of contract with prospective buyers; (6) by refusing to sell products to any manufacturer or jobber not agreeing not to deal in similar products manufactured by others; (7) by instigating patent litigation, or threatening with prosecution dealers in the commodity of a competitor; (8) by devising a pretended license agreement, under which the New Departure Manufacturing Company was to act as ostensible licensor, and the other corporation defendants as licensees, for the manufacture and sale of said coaster brakes and accessories under patents claimed to be owned by the former, and covering only parts thereof; (9) by entering at the same time into license agreements whereby the licensor agrees not to grant additional licenses without the consent of the licensees; (10) by granting uniform licenses containing schedules of non-competitive prices, discounts, and restrictions on sales to outside dealers; (11) by the discontinuance of pending litigation between the various defendants, and agreement not to question the validity of any patents owned by licensees; (12) by the payment of pretended royalties to the New Departure Manufacturing Company, which were credited back in return for the use of other letters patent; (13) by arranging for the deposit with an arbitrator of a guaranty fund to insure against breach of license agreement between licensor and licensees, and for the settlement of all disputes arising among the defendant corporations by said arbitrator; (14) by agreeing upon arbitrary non-competitive prices for the sale and resale of coaster brakes and accessories by jobbers, and by agreement to sell only to listed jobbers as per arrangement; (15) by giving discounts only to such manufacturers and jobbers as the defendant corporations should jointly sanction; and (16) by carrying on litigation against competitors, and by preventing members of the combination from selling to competitors.

The general claim of the Government is that it was the purpose and intention of the defendants to discourage and destroy competition by intimidation and coercion, by the institution of litigation against infringers of patents, and by the pretense of a basic license arrangement, running exclusively to the defendant corporations, binding each to a strict observance of the selling prices of the manufactured product, future prices, restrictions on sales to jobbers, retail dealers, and customers, etc.

Defendants contend that the indictment is fatally defective because it fails to charge, first, the formation of a conspiracy in violation of the act under consideration, as an averment that the defendants "are engaged in a conspiracy among themselves" to accomplish an unlawful end is not the equivalent of a direct charge of the formation or existence of a conspiracy; second, that the act is too indefinite to sustain a criminal prosecution; and, third, that the facts upon which the Government relies are equally as consistent with a lawful agreement to restrain interstate trade and commerce as with an unlawful agreement.

[1] With respect to the asserted failure to charge a conspiracy, there was considerable discussion at the bar; it being contended, inter alia, that the existence of the conspiracy cannot be shown by the averment of the commission of overt acts. Sections 1 and 2 of the Federal Anti-Trust Act read as follows:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with [111] foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The first part of section 1 states that every contract, combination, or conspiracy in restraint of trade or commerce among the several States is illegal, while the sentence following is declarative of the character of the offense. Was it necessary to directly charge the existence or formation of a conspiracy upon which to base an accusation that the defendants engaged in a combination or conspiracy? The quoted provision is perhaps not as clearly expressed as it might be; but I think the phrase "engage in such combination or con-

spiracy" is used in a broad sense, and includes not only such persons as initiate a conspiracy, but also those who afterwards engage therein. In *United States* v. *Greenhut* (D. C.) 50 Fed. 469, the indictment was held insufficient, because the crime was not charged in the language of the statute or its equivalent. In this case the precise language of the statute is used to charge the offense, and in addition the particular acts done or to be done by the defendants to effectuate the crime are set forth. It is a cardinal rule of criminal law that an indictment is not invalid for insufficiency, if it embraces the language of the statute and covers and includes the essential ingredients of the offense with sufficient certainty to apprise the defendant of the charge that he will be called upon to meet. *United States* v. *Britton*, 108 U. S. 193, 2 Sup. Ct. 525, 27 L. Ed. 703; *Rosen* v. *United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; *United States* v. *Patterson* (D. C.) 201 Fed. 697, opinion by Hollister, J.

It is true that indictments under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676) must contain a definite charge of conspiracy to defraud the Government or to commit an offense against the United States, and resort cannot be had to a statement of overt acts to compensate for such omission; yet this rule of pleading, repeated in many adjudications cited in defendants' brief, is not believed to be controlling in a prosecution charging the violation of the Sherman Act, which evidently does not require the averment of an overt act to constitute the offense the gravamen of which is to combine or conspire, or to engage in a combination or conspiracy. *United States* v. *Kissel* (C. C.) 173 Fed. 823; *United States* v. *Patten* (C. C.) 187 Fed. 664, affirmed by the Supreme Court, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333. In legal parlance, the words "engage in" signify embark in, take part in, or enlist in, and when they are used in connection with the words "combination or conspiracy," as in the act, [112] they mean substantially the same thing as to conspire; for one who engages in a con-

becomes a conspirator, regardless of whether or not

the conspiracy has previously been initiated. In describing the offense without limitations, or without the inclusion of a condition that an overt act need be first committed to complete the offense, Congress doubtless had in mind this definition. When the Patten case, *supra*, was decided by the Supreme Court, a writ of error having been sued out by the Government, Mr. Justice Van Devanter, who delivered the opinion of the court, said that such act made it a criminal offense to "engage in" a "conspiracy in restraint of trade or commerce among the several States." The particular phrasing of the indictment against Patten is not mentioned, but it was apparently considered that the offense consisted of engaging in a conspiracy.

[2] Counsel for defendants have elaborately argued that the averments in the indictment are in perfect harmony with a lawful purpose, and that the conclusion that the defendants intended to destroy competition among themselves is insufficiently supported; but in this I do not agree. The acts committed, or to be committed, by the defendants, in combination with an association, the assignment of pretended license rights tending towards the establishment of uniform prices for the products, and the agreement upon non-competitive discounts to jobbers, dealers, etc., are evidential features from which the intention of the defendants must be ascertained. As said in *Swift & Co.* v. *United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518:

"Where acts are done with an unlawful intent and an unlawful combination results, the offense is committed, even though the acts done were in themselves perfectly innocent and lawful. But this act directs itself against the dangerous probability, as well as against the completed result."

[3] Upon this feature of the controversy it will be enough to briefly advert to the contention by defendants that inferentially the indictment (counts 1, 2, and 3) alleges that the defendants, the New Departure Manufacturing Company, was owner of a basic patent for making coaster brakes, and issued licenses to manufacture thereunder. Reference to the indictment, however, discloses that the patent license agreement, separately considered and unconnected with any pretense, is not claimed to have been an element of unlawful-

Opinion of the Court.

ness. Careful reading thereof shows that the asserted culpability of the defendants is primarily based upon the allegation that the defendant corporations were separately owners of patents and patent rights for improvements in the coaster brake and other bicycle and motor cycle accessories, differing from those held by the other corporation defendants, but that the defendants, to effectuate their plan or scheme to restrain trade, feigned the making of a license agreement ostensibly covering a part, but not the whole, of the coaster brake manufactured by the New Departure Manufacturing Company. Importance is attached to that part of the indictment charging that:

"The said pretended license agreements which were to be entered into simultaneously by the said New Departure Manufacturing Company as ostensible licensor with the remaining corporation defendants as ostensible separate licensees were to be in all respects uniform in character, were to [113] contain schedules of uniform and noncompetitive prices, restrictions upon all sales of the aforesaid merchandise and products to be made by any of said corporations defendants to jobbers and manufacturers," etc.

This assertion, when considered with other averments, would seem to clearly negative the inference that the licenses were for a basic patent, or that conditions were imposed on competitors in good faith and without an intention to violate the statute under consideration. None of the separate patent rights owned by the defendant corporations hinged or depended upon license rights transferred by the New Departure Manufacturing Company, and the right to manufacture was not derived from it.

We are not at this time concerned with the scope of the claims of such license patent, or with the right to license others to manufacture or sell the patented articles, or to impose license conditions, or to fix the prices of sale to jobbers or dealers and by them to customers, and therefore the authorities cited by counsel for defendants, showing that patentees have the right to license others and to impose conditions as to price, etc., are not now applicable. Whether the plan was lawfully devised, without an intention to monopolize or engage in a conspiracy in restraint of interstate trade, is a question not now determinable, though it may be remarked that the general scheme by which the prices

were to be fixed and controlled, assuming the truthfulness of the averment as to the grant of a pretended license, possesses an ingenious intermingling of various business interests, which no doubt justifies the conclusions of the indictment that the intention was to discourage and destroy competition and to attempt to create a monopoly.

In the *Bath-Tub Trust case*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 117, so called, a case recently decided by the Supreme Court of the United States, a situation somewhat similar to this in respect to quantity of output and license agreement was presented, and the court said:

"The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the coöperation of 85 per cent of the manufacturers. * * * The agreements therefore clearly transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law."

The Supreme Court then pointed out the distinction between that case and the case of *Bement* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; but nevertheless the intimation in the opinion is clear that the monopoly secured to the patentee by the issuance of a patent cannot be designedly used to form a combination or conspiracy between manufacturers and dealers to accomplish a restraint of trade such as the Anti-Trust Act prohibits. Upon this subject the Circuit Court of Appeals for the Third Circuit, in *National Harrow Co.* v. *Hench et al.*, 83 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299, has aptly said:

"The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by [114] them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that only the patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges."

Opinion of the Court.

The language quoted was cited with approval by Judge Coxe in *National Harrow Company* v. *Hench et al.* (C. C.) 84 Fed. 226.

In *Blount Manufacturing Co.* v. *Yale & Towne Mfg. Co.* (C. C.) 166 Fed. 557, of the patentees' privilege of combining their patent rights the court said:

"Where, however, each patentee continues to make his own goods under his own patents, and seeks to enhance his profits by agreement with creditors who make either patented or unpatented articles, then it seems to follow that the agreement of each to restrain his own trade cannot be regarded merely as an incident to the assignment of patent rights. The patentee then restrains his own trade, not for the purpose of enhancing the value of the license which he grants, but for the purpose of enhancing the value of his trade by removing competition."

So here, as claimed by the Government, the license agreements were resorted to as a subterfuge to aid in stifling competition in trade and commerce, and to enhance the value of the respective businesses of the defendant, and to create a monopoly in their productions. In *Sanitary Manufacturing Co.* v. *United States* (the Bath-Tub Trust case) the Supreme Court clearly supports the view that patentees' rights are limited by the Anti-Trust Act, as the following excerpt from the opinion shows:

"Rights conferred by patents are, indeed, very definite and extensive; but they do not give any more than other rights a universal license against positive prohibitions. The Sherman Law is a limitation of rights—rights which may be pushed to evil consequences, and therefore restrained."

[4] It is next objected that the Sherman Act is unconstitutional; but as to this ground of demurrer it is enough to say that since the hearing, or just prior thereto, Judge Hollister, in *United States* v. *Patterson* (D. C.), 201 Fed. 697, expressly held to the contrary, and stated in his opinion that, prior to his passing upon the constitutionality of the act, it had already been held constitutional by Judge Angel sitting at the trial of the Bath-Tub Trust case, by Judge Hand in the Sugar Trust prosecution, and by Judge Putnam in the Shoe Machinery Trust case (*United States* v. *Winslow* [D. C.], 195 Fed. 578). As such decisions are in complete accord

with my own views, I am persuaded that the Anti-Trust Act as a criminal statute is a valid enactment.

[5] It is further objected that the offenses are not averred to have been committed within three years, and criticism is made of the phrasing "during said period" in the indictment; but as it is also alleged that the unlawful acts were committed by the defendants "continuously during a period of time from the 1st day of July, 1907, to the present 8th day of January, 1912," the time is stated within the [115] statutory limitations with sufficient definiteness. *Glendale Woolen Mills* v. *Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309.

[6] The seventh and eighth counts, which aver an attempt to monopolize the business carried on by the defendants, are also criticized as being too vague, uncertain, and indefinite. This objection has already been sufficiently answered by what has been said in passing upon the preceding counts. It was not improper to incorporate therein by reference the facts specified in counts 1, 2, and 3. *Crain* v. *United States*, 162 U. S. 634, 16 Sup. Ct. 952, 40 L. Ed. 1097; *Blitz* v. *United States*, 153 U. S. 315, 14 Sup. Ct. 924, 38 L. Ed. 725.

Assuming, then, as we must, that all the facts and circumstances as summarized herein are true, it is thought to be plainly shown that the continuation of such acts by confederation or concert of action on the part of the defendants tends towards the creation of a monopoly in the manufacture of the specified articles. Indeed, by the methods and acts complained of, the commingling of separate interests in separate patent rights, by the issuing of a pretended license for a pretended basic patent, with the intention of fixing uniform prices and discounts and imposing other conditions, benefits, and advantages were secured which may be enjoyed only by a separate patentee in the protection of his true monopoly. It was such courses of procedure by industrial interests in whatever form or guise that the Anti-Trust Act was designed to check and prevent.

The demurrers are overruled on all grounds, and the defendant corporations and individuals are required to plead to the indictment at this regular term of court.

Opinion of the Court.

ROBERT H. INGERSOLL & BRO. *v.* McCOLL.

(District Court, D. Minnesota, Third Division. March 17, 1913.)

[204 Fed. Rep., 147.]

MONOPOLIES (§ 17)—PATENTS—LICENSE—VALIDITY OF PRICE RESTRICTION.—If a license restriction imposed by the owner of a patent is not for the purpose of protecting the patent or for securing its benefits, but for the purpose of evading the Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), it is void.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

MONOPOLIES (§ 17)—PATENTS—LICENSE—VALIDITY OF PRICE RESTRICTIONS.—Complainants make and sell, under different trade names, watches containing parts which are patented. Each watch is placed in a box, and on some of the boxes is printed a notice or so-called license restriction, by which complainants attempt to control the price at which the watch may be sold by jobbers and retailers under penalty of being charged with infringement of the patents. Others of the watches, sold under different trade names, but having the same mechanism and containing the same patented parts, are sold without any restriction. *Held*, that such restrictions were clearly not intended to protect the use of the patents or the monopoly which the law confers upon them, but for the protection of certain of the trade-marks, and that a purchaser who had no contract relations with complainants was not bound thereby.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

In Equity. Suit by Robert H. Ingersoll & Bro. against Henry McColl. On final hearing. Decree for defendant.

Edward S. Rogers, of Chicago, Ill., and *E. S. Stringer*, of St. Paul, Minn., for plaintiff.

C. D. O'Brien, of St. Paul, Minn., for defendant.

WILLARD, District Judge.

This is a suit for the [illegible] of patent No. 787,041, granted April 11, 19[illegible] [illegible]ents in lantern pinions used in watches, [illegible] granted June 4, 1907 [illegible]

[a] [illegible] Publishing Company, [illegible]

Opinion of the Court.

for improvements in lever escapements used in watches; patent No. 926,329, granted June 29, 1909, for improvements in watches relating to stem-winding and setting; and patent No. 958,987, granted May 24, 1910, for improvements in center frictions in watches. The infringement is said to consist in this:

The plaintiffs are owners of the patents. They cause to be manufactured for them a watch known under three names, "Ingersoll Dollar Watch," "Yankee Dollar Watch," and "Yankee." This they sell to jobbers, who sell to retail merchants. Each watch is packed in a box, on the outside cover of which is pasted the following notice:

"LICENSE.

"Robt. H. Ingersoll & Bro., Makers, New York, Chicago, London, San Francisco.

"Mechanism in this watch is covered by United States patents, and the watch is licensed and sold under and subject to the following conditions, assented to by purchase and controlling all sales and uses thereof, any viola[148]tion of which license conditions revokes and terminates all rights and license as to this and all other watches of makers in violator's possession, and subjects the violator to suit for infringement of said letters patent:

"(1) Jobbers may sell only to retail dealers, may not sell to any one designated by makers as objectionable, may not detach or sell without this notice, and may sell only at rates specified in schedules furnished by makers.

"(2) Retailers may advertise and sell only to buyers for use at ONE DOLLAR.

"(3) No donation, discount, rebate, premium, or bonus may be allowed or given in connection with any sale at wholesale or retail.

"(4) Guarantee, with date of sale indorsed thereon, to accompany each watch."

The defendant, a retail druggist in St. Paul, never bought any watches from the plaintiffs, and never had any contractual relations with them. He did, however, buy from a jobber in Duluth several of the Yankee watches, advertised them for sale in his store at 83 cents each, and sold them at that price. He knew at the time of so advertising and selling [illegible] icense restriction imposed by the plaintiffs in [illegible] price. The prayer of the bill is that he be

enjoined from selling a Yankee watch for less than $1, and for damages and profits.

The real question in the case is whether this is a suit to protect a trade-mark, or one to protect a patent.

The Supreme Court of the United States has not yet directly decided that such a price restriction upon a patented article is binding upon a person who has entered into no contractual relation with the patentee. *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 345, 28 Sup. Ct. 722, 52 L. Ed. 1086; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 402, 31 Sup. Ct. 376, 55 L. Ed. 502. Nor has the Circuit Court of Appeals of this circuit so decided, but that court in the case of *National Phonograph Co.* v. *Schlegel*, 128 Fed. 733, 64 C. C. A. 594, did hold that such a price restriction could be enforced against a person who had entered into contractual relations with the owner of the patent.

But although the owner of a patent may control the price of the patented article, it does not follow that the owner of a trade-mark can do so. No such power is vested in the owner of a copyright. *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086. The owner of an unpatented medicine cannot control the price in the hands of retail dealers with whom he has no contractual relations. An attempt to do so would be a violation of the Anti-Trust Law. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. It is very clear that the owner of a trade-mark is in no better position than the owner of a copyright. If this suit is really for the protection of a trade-mark, it cannot be maintained. Nor can it be maintained on the ground of any contractual relation between the plaintiffs and the defendant, because there was none.

Can it be maintained on the ground that the purpose is to protect a patent? In *E. Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, on page 92, 22 Sup. Ct. 747, on page 756 (46 L. Ed. 1058), the court said:

[149] "But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article

may be used and the price to be demanded therefor. Such a construction of the act (Sherman Act) we have no doubt was never contemplated by its framers."

In *Henry* v. *Dick Co.*, 224 U. S. 1, on page 31, 32 Sup. Ct. 364, on page 372 (56 L. Ed. 645), the court said:

"If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable."

In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 117, decided by the Supreme Court November 18, 1912, the court said:

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law. It had, therefore, a purpose and accomplished a result not shown in the Bement Case. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was a part of a contract and combination with many other companies, and constituted a violation of the Sherman Law; but the fact was not established, and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 [32 Sup. Ct. 364, 56 L. Ed. 645], which contravenes the views herein expressed."

[1] From these authorities the rule to be deduced is this: If the license restriction is imposed, not for the purpose of protecting the patent or for securing its benefits, but for the purpose of evading the provisions of the Anti-Trust Act, then it is void, because such restriction is not "a reasonable condition imposed upon the licensee of a patent by the owner thereof," nor is it "a condition suitable to protect the use of a patent and secure its benefits."

It is necessary, therefore, to examine the evidence to see what the real purpose of the license restriction is in this case. Putnam, a witness for the plaintiffs, has been connected with their business for 15 or 16 years, and is, and for

more than 10 years has been, their general sales manager. He testified, among other things, as follows:

"Q. Please state what the fact has been, and is, in reference to the use of the complainant during this period of trade-marks and brand names in connection with the manufacture and sale of its products, and if trade-marks or brand names have been used thereon, please give some of the principal names employed. A. The general name under which its principal watch products have been sold is 'Ingersoll.' Different classes or grades of watches have been given identifying names, each of which has been largely advertised and has become a trade-mark for such particular watch. These names as now and recently used are 'Yankee,' 'Eclipse,' 'Midget,' and 'Junior.' There are and have been other names, but they are not in such common or large use.

"Q. Please state whether these names 'Ingersoll,' or the universal general trade-mark name for the product, and the names 'Yankee,' 'Eclipse,' 'Junior,' 'Midget,' and other names have been in any way advertised as trade-mark [150] or brand names of the product? A. Each of such names has been largely advertised; the name 'Yankee' has been very largely advertised.

"Q. Of these different trade-mark names, 'Yankee,' 'Eclipse,' 'Junior,' 'Midget,' which has been the most extensively advertised? A. 'Yankee,' or, as it has been commonly known and advertised, the 'Dollar Watch.'

"Q. About when was the name 'Yankee' adopted by the complainant as a trade-mark name for a part of its product? A. Some time prior to 1897.

"Q. At the time of its adoption, and since, has this name 'Yankee' been applied to a watch of particular construction? By that I mean distinctive construction, although it may have varied at different times? A. Yes.

"Q. At the time that the word 'Yankee' was adopted as a trade-mark name, and during the period that it was so adopted by the complainant, has there been a retail selling price for such Yankee watch, designed and requested to be employed and used by retailers? If so, please state what this retail selling price was. A. Since 1897, or thereabouts, there has been such retail selling price, and it was at that time and ever since one dollar.

"Q. How has the fact of one dollar being indicated and requested as the retail selling price been employed in connection with the Yankee watch in advertising it to the trade and public? By that I mean has this term 'Dollar Watch' come to be associated with the ngersoll Yankee watch as a trade-mark name or phrase. A. It has.

se explain to what extent, if any, the term 'Dollar Watch' ated with and is now used, if at all, as a trade- or the Ingersoll Yankee watch in advertising and by the public. A. It is my opin-

ion, based upon observations and knowledge, that the term 'Dollar Watch,' as applied to the Yankee watch, has lost, if it ever had, a monetary significance to the trade or to the public, and it is my belief that the two terms interchangeably used—'Dollar Watch' and 'Yankee Watch'—as trade-marks are associated definitely in the public mind with the same watch, the principal Ingersoll product in watches.

"Q. Please state to what exent, if any, the term 'Dollar Watch' has been employed since 1897 in advertising the Ingersoll Dollar Watch. A. In almost every advertisement and show card the term 'Dollar Watch' has been used, and usually in such advertising and show cards the picture of a watch has been shown, on which watch has appeared the trade-mark 'Yankee.' During the period referred to in the question, much more than a million dollars has been expended in the various ways referred to in my answer to question 17, and the largest part of such sum has been directed to the advertising of the Yankee or Dollar watch.

"Q. During this period, has the newspaper or magazine advertising of the Ingersoll watch contained the term 'Dollar Watch,' and, if so, in a general way to what extent? A. Almost always.

* * * * * * *

"Q. Referring to the license shown upon the box marked 'Exhibit F,' containing the watch marked 'Exhibit G,' referred to Saturday in the testimony of Arthur H. Brown, please state, if you know, the date at which this license system was adopted, connected with the manufacture or sale of the Ingersoll Yankee or Dollar watch. A. In this particular form, this license system was adopted about six years ago.

* * * * * * *

"Q. Please state the fact as to whether, prior to the adoption of this license system some six years since, in connection with the Yankee or Dollar watch, this watch, under the name 'Ingersoll Yankee,' 'Yankee,' 'Ingersoll Dollar Watch,' or 'Dollar Watch,' had obtained any reputation, either in the trade or with the public. A. I can perhaps best answer this question by stating that in the year 1899 about one-half million Ingersoll Yankee watches were sold, and that the sale thereof increased yearly until in 1905 or thereabouts the sale had reached at least a million of these Ingersoll Yankee or Ingersoll Dollar watches. They were handled by many thousands of merchants throughout the United States and foreign countries.

"Q. About what is the annual output of the Ingersoll Yankee or Dollar watch at present? A. About 2,000,000 per year."

[151] He further testified that the Yankee or Dollar watch, since it was put upon the market in about 1897, contained mechanism covered by letters patent of the United States. In that connection he also said:

"Q. Have any notices of the dates or numbers of the patents covering the mechanism embodied therein been placed upon the

watches? If so, please state where. A. For a great many years past, and I believe always, each Yankee watch has had stamped upon it the word 'patented' and the dates of such patents as from time to time they existed in such watch. Such notice has usually been stamped upon that part of watch known as the barrel bridge, which is, commonly speaking, a part of the rear movement plate or rear of the watch movement."

He further said:

"Q. What was the occasion or reason, if any, for the adoption by the complainant of this license system for the Ingersoll Yankee or Dollar watch, if you know? A. About 1899, or possibly 1900, when the sale of this Ingersoll Yankee watch or Ingersoll Dollar watch had reached into many hundreds of thousands, a few merchants, both retailers and jobbers, sought to take advantage of the reputation of this watch, established by large advertising and large sale, by offering it to the public or to the trade, as the case might be, at less than the prices which the complainant had fixed upon for such watches. This caused protests from merchants, both retailers and jobbers, throughout the country, who threatened, if such cut prices were allowed to continue, that they would cease handling and dealing in and buying from the complainant this Ingersoll Yankee watch. Thereupon complainant, knowing that its continuance as a business organization for the manufacture and sale of watches depended upon the good will of these merchants, both jobbers and retailers, and the continued and continuous buying, handling, and selling by them of this watch, cast about for a plan by which it could properly and lawfully fix, determine, and control the price at which this Yankee watch might be sold by the merchants, both retailers and wholesalers, and, having found what, in their opinion was a proper means, determined upon and did adopt such means, out of which this present license system later grew.

"Q. Prior to the adoption of the license system in its present or original form, did the complainant have a means of controlling the prices of the Ingersoll Yankee or Dollar watch in the hand of dealers, or did it simply indicate the prices at which it desired the dealers to sell, without any means of enforcing such prices? A. While always indicating the price, it knew of no means, and believed it had no means, of controlling such prices.

"Q. And until the license system was adopted, it was simply optional with the dealers to observe these prices, I understand? A. If you mean by 'license system' any system which the complainant had adopted, including the system adopted about 1899 or 1900, the answer is 'Yes.'

...understand that a license system was adopted about 1899 ... various modifications, about six years since took ...at is correct."

This testimony strongly indicates that the purpose of the plaintiffs was to protect the trade-mark, and that the patented improvements placed in the watch were of little or no consequence. There were always in the watch such patented improvements, but they were not always the same. The dates of patents placed upon the interior mechanism of the watch varied from time to time. The license system was adopted in 1900, but the earliest one of the patents in suit was not granted until 1905. The case of these same plaintiffs against Snellenberg (C. C.) 147 Fed. 522, indicates that further evidence in support of the inference drawn from the testimony already in the case might [152] have been obtained. The purpose of that suit was the same as the purpose of this suit. One of the patents there involved was for an improvement in escapement mechanism, and was issued in December, 1890; that patent expired in 1907. The escapement patent here in suit was granted on June 4, 1907. The other patent in that suit was for an improved clock pinion, and was granted in January, 1891. That patent expired in 1908. The lantern pinion patent in this suit was granted on April 11, 1905. The plaintiffs make a high-grade watch, which contains none of the mechanism covered by the patents in suit.

There has been no judicial determination of the validity of any one of them. There has been no litigation concerning any one of them. No testimony was presented by the plaintiffs to show that any one of the patents was of any value. The defendant produced as a witness a watchmaker of 30 years' experience, who testified that there was nothing new in any of them. The plaintiffs presented no evidence in rebuttal. There is nothing in the case to show what patents relating to the subject-matter of these improvements were granted prior to the patents in suit. While the defendant's watchmaker testified that he understood the scope of the claims of two of the patents, yet it appeared that one at least of the other two he had never read. His evidence probably is not sufficient to overcome the presumption of novelty and utility created by the issuance of the patents.

The most important evidence, however, remains to be stated. In addition to the Yankee, Eclipse, Midget, and

Junior, the plaintiffs sell other watches, one of which is called the Defiance. These watches, according to Putnam, have probably hundreds of special names. One of the watches offered in evidence was called the McColl, and was so named at the request of the defendant. He bought 27 dozen Yankee watches and 18 dozen of the other kind. He paid 65 cents each for the Yankee and 55 cents each for the McColl watches. The Defiance and the McColl contain the same mechanism as the Yankee. The parts of the Yankee and the parts of the McColl and the Defiance are interchangeable. In fact, it is the same watch under three different names. The barrel plates of the Defiance and the McColl contain the dates of all the patents in suit. There is nothing on either of these watches to indicate that the plaintiffs are in any way connected with them. They are sold without any license restriction, such as it attached to the sale of the Yankee. While the purchaser of the Yankee is required to sell it for not less than $1, a purchaser of identically the same watch, if it is called the Defiance or the McColl, can sell it for any price he chooses.

If the purpose of the license restriction were to secure the benefits of the patents, no sound reason can be given why it should not have been applied to the watch when it is called the Defiance, as well as when it is called the Yankee. It is very evident that the plaintiffs care nothing for the patents. They say in one of their briefs:

"A point was made at the argument that complainant makes three watches under different names and embodies in them the same patents, and that only one of them, the Yankee watch, is sold under the license restriction. What inference it is sought to draw from this fact is not apparent. Complainant, having a complete monopoly under the statute, is not bound to [153] exercise all of it. It may release any part of it that it sees fit and reserve the rest. If it wishes to release the 'Defiance' and the 'McColl' watches entirely from the patent monopoly by unrestricted sale, and retain a portion of its monopoly of sale with respect to the Yankee watch, it may do so."

The right of a patentee to do what he may please to do with the patented article is not unrestricted. It is limited in [illegible] manner indicated by the cases hereinbefore cited. He cannot impo[illegible] purchaser a condition which is un-

reasonable. He cannot impose an unreasonable condition, for the purpose of enabling him to violate the Anti-Trust Act. It appears from the evidence in this case that the license restriction so imposed on the sale of the Yankee watch is not for the purpose of securing the benefits of the patented improvements therein, but in order that the plaintiffs may protect the trade-mark or trade-name under which they sell the watch. Such a condition was not imposed "to protect the use of the patent or the monopoly which the law conferred upon it." It is an unreasonable one, is beyond the power of the plaintiffs to impose upon the defendant, and is void as to him. Whether or not it would be valid if the defendant had made a contract directly with the plaintiffs, and thereby bound himself not to sell the Yankee watch for less than $1, it is not necessary to decide.

Let the bill be dismissed, with costs.

HALE ET AL. v. HATCH & NORTH COAL CO. ET AL.

(Circuit Court of Appeals, Second Circuit. April 14, 1913.)

[204 Fed. Rep., 433.]

MONOPOLIES (§ 28) — CIVIL DAMAGES — EVIDENCE — QUESTION FOR JURY.—In an action by a private individual to recover threefold damages, authorized by Sherman Anti-Trust Law July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), against an alleged combination of [434] coal dealers in a city, engaged in interstate commerce, to force plaintiff out of business and into bankruptcy, which they were successful in doing, evidence *held* to entitle plaintiff to submission to the jury of the question whether a combination and conspiracy among defendants existed, whether they maintained a secret organization to keep up prices and to boycott dealers who did not enter the organization, and whether plaintiff was injured as the result of such conspiracy.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

In Error to the District Court of the United States for the District of Connecticut; James P. Platt, Judge.

Opinion of the Court.

Action by Charles R. Hale and others against the Hatch & North Coal Company and others. A judgment was entered in favor of defendants by direction of the court, and plaintiffs bring error. Reversed.

Ralph M. Grant and *Josiah H. Peck*, both of Hartford, Conn., and *James A. Marr*, of Bridgeport, Conn., for plaintiffs in error.

Henry Stoddard, of New Haven, Conn., and *Hyde, Joslyn, Gilman & Hungerford*, *J. Gilbert Calhoun*, and *John J. Dwyer*, all of Hartford, Conn., for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge.

This action is brought under the Sherman Law (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), the seventh section of which gives a private individual, whose business is injured by any of the acts forbidden by the law, or declared unlawful thereby, the right to sue therefor and recover threefold damages. The act declares contracts, combinations, and conspiracies in restraint of trade or commerce among the several States, illegal. It also provides that every person who shall monopolize or combine or conspire with any other person to monopolize interstate commerce, or make a contract or enter into a combination or conspire in restraint of trade, shall be guilty of a misdemeanor. For several years after October, 1903, the plaintiff, Charles R. Hale, had been engaged at Hartford, Conn., in buying and selling coal mined in States other than Connecticut. A large part of this coal was mined in Pennsylvania and was the subject of interstate commerce.

The defendants were coal dealers of Connecticut, having a place of meeting at Hartford where they frequently met. The plaintiff had built up an increasing business and had received a contract to supply the city with coal, for which he had underbid the other dealers. Soon thereafter he found it impossible to get coal from wholesale dealers, who

not only refused to supply him, but in one instance, at least, canceled an order already accepted. Parties to the alleged conspiracy endeavored to persuade dealers outside of Hartford not to furnish him with coal. Other parties endeavored to persuade him to join the combination. The final result was that the plaintiff was forced into bankruptcy.

[435] During the comparatively short period in which Hale had been engaged in buying and selling coal he succeeded in building up a flourishing and steadily increasing business until he was successful in procuring the contract with the city in competition with the defendants. Then his troubles began; difficulty after difficulty confronted him, obstacle after obstacle was placed in his path; the result being, as before stated, failure and bankruptcy. We have, then, a successful and growing coal business destroyed. A large number of local dealers whose interests were hostile to those of Hale. Inability on Hale's part to purchase coal except at ruinous prices.

In looking for the causes responsible for Hale's ruin, we naturally turn to those persons who were being injured by his success, viz. the local coal dealers of Hartford. It appears that they rented a room in the Hartford Trust Company building where they held meetings, that they met there and elsewhere under circumstances indicating secrecy. It also appears that several of the members openly expressed the opinion that Hale's conduct was demoralizing the price of coal in Hartford. One of the witnesses testified that the secretary of the Hartford Coal Dealers' Association, and a defendant, stated to the witness that "they had an association that was holding up the price of coal; and that everybody was in it with the exception of Mr. Hale."

Without considering the entire testimony which points to the defendants, or some of them, as the parties responsible for the destruction of Hale's business, we think enough has been stated to make it clear that the question was one of fact which should have been submitted to the jury. It is true that the evidence is to a large extent circumstantial. The defendants did not write out and formally pass a reso-

lution declaring that Hale was demoralizing the trade by selling at lower prices than the association deemed reasonable and that, therefore, they would not deal with him themselves or with any wholesaler who sold him coal. Conspirators do not work in this way. They do not advertise their purpose openly; their methods are secret, sinister, and clandestine. It is rare, indeed, that a conspiracy is proved by direct evidence. In a vast majority of cases circumstantial evidence is relied on. Such evidence is as efficacious as direct if it establishes the proposition that the defendants, or some of them, had a common purpose to violate the law which they succeeded in accomplishing. *Marrash* v. *United States*, 168 Fed. 225, 229, 93 C. C. A. 511.

The jury might have found that the combination and conspiracy alleged in the complaint existed; they might have found that there was a secret organization of Hartford dealers to keep up prices and to boycott those who did not enter the organization. Had they so found their verdict could not have been set aside as contrary to the evidence. It matters not whether the evidence was strong or weak, it is sufficient that the jury was justified in finding that it established the alleged conspiracy. It cannot be held as matter of law that the plaintiff failed to make a case.

The judgment is reversed.

UNITED STATES *v.* WINSLOW ET AL. (TWO CASES.)[a]

(District Court, D. Massachusetts. March 2, 1912. On Petition for Rehearing, March 21, 1912).

Fed. Rep. 578.]

INDICTMENT A[illegible] —SHE[illegible] TI-TRUST ACT—
CONSTRUCTIO[illegible] [act July
2, 1890, c. [illegible] p. 3200])
pro[illegible] restrain[illegible]
of [illegible] on or com[illegible]—

J. S[illegible]

Syllabus.

spiracy shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished, etc. *Held*, that the offense under such section permits in one count of an indictment an allegation of but a single transaction, to wit, the allegation of making one contract or engaging in one combination or conspiracy, although such a combination or conspiracy when once effected may be continuous.[a]

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. § 125.]

INDICTMENT AND INFORMATION (§ 150)—DEMURRER.—Where the questions raised by demurrer to an indictment are both intricate and doubtful, the demurrer may be overruled, and their decision postponed until the trial on the merits. Kansas *v.* Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 497; Dec. Dig. § 150.]

CORPORATIONS (§ 369)—OFFICERS—CRIMINAL LIABILITY.—Officers or directors of a corporation cannot protect themselves from criminal liability behind the corporate organization where they are the actual, present, and efficient actors in the commission of the offense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1510; Dec. Dig. § 369.]

CRIMINAL LAW (§59)—MISDEMEANORS—PRINCIPALS.—All parties who are active in promoting a misdemeanor, whether agents or not, are indictable as principals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig §§ 71–74, 76–81; Dec. Dig. § 59.]

INDICTMENT AND INFORMATION (§106)—ALLEGATION OF DOCUMENTS.—Where, in an indictment, it is necessary to plead numerous documents which in themselves were not directly the subject matter of the litigation, it is not necessary to set out each instrument by its tenor.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 283; Dec. Dig. § 106.]

MONOPOLIES (§ 31)—INDICTMENT—INTENT.—The rule applied that an indictment for an illegal combination and conspiracy must necessarily allege facts in detail to enable the court to determine for itself whether or not the alleged combination or conspiracy is to be carried out by what are in truth unlawful methods.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 10)—SHERMAN ANTI-TRUST ACT—CONSTITUTIONALITY.—Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), making it a criminal [illegible] make any contract or engage in any combination or [illegible] restraint of interstate trade or commerce, or to mo-

[a] [illegible]ghted, 1912, by West Publishing Company.

Syllabus.

nopolize, or attempt to monopolize, or conspire with any person to monopolize, any part of such trade or [579] commerce, was not unconstitutional for indefiniteness in so far as sought to form the basis of a criminal proceeding.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.]

INDICTMENT AND INFORMATION (§ 99)—INCORPORATION BY REFERENCE.—The rule applied that later parts of an indictment may incorporate the details of matters properly set out in the earlier parts by reference, subject, however, to the rule that duplicity and repugnancy must be avoided.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. § 99.]

MONOPOLIES (§ 10)—RESTRAINT OF TRADE — STATUTES — CONSTRUCTION.—Sherman Anti-Trust Act (act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) is subject to the rule that statutes are not to be interpreted to change the common law except so far as a purpose to do so is necessarily implied; therefore it is *held*, that the act was not intended to prohibit those minor contracts in partial restraint of trade which the common law had affirmed as reasonable, but was to be construed in accordance with the common law, developed along reasonable lines in accordance with modern commercial advance.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.]

MONOPOLIES (§ 20)—COMBINATION IN RESTRAINT OF TRADE—NON-COMPETING INDUSTRIES.—Combination of several corporations, each selling or leasing machinery intended for different operations, not competing, but supplementing each other, does not ordinarily constitute a monopoly in restraint of trade.

[Ed. Note.—For other cases, see Monopolies. Dec. Dig. § 20.

For other definitions, see Words and Phrases, vol. 5, pp. 4570–4574.]

COMMITTEE OF PRIVY COUNCIL—DECISIONS—CONCLUSIVENESS—MONOPOLIES—DEMURRER.—The business of the United Shoe Machinery Company is conducted by a system of leases, which are substantially the same as those described in *United Shoe Machinery Company v. Brunet* [1909] App. Cas. 330. It is claimed in these indictments that the provisions of these leases are unreasonable, and unlawfully operate to build up the alleged monopoly of the United Shoe Machinery Company. It is claimed by the respondents that *United Shoe Machinery Company v. Brunet* should be applied here, and that in harmony therewith the leases in question here should be declared valid. *United Shoe Machinery Company v. Brunet* was decided by a very able court, yet it was a decision of the judicial committee of the Privy Council, and therefore not authoritative as the decisions of the established courts of Great Britain. Independ-

ently of these considerations, the pleadings in these indictments do not permit us to so apply on this demurrer *United Shoe Machinery Company* v. *Brunet* to such extent as to support the demurrer.

Sidney W. Winslow and others were indicted for violating the Sherman Anti-Trust Act. On demurrers to indictments. Sustained in part and overruled in part.

Asa P. French, U. S. Atty., *Edwin H. Abbot, Jr.*, Sp. Asst. U. S. Atty., *William S. Gregg*, Sp. Asst. Atty. Gen., *James A. Fowler*, Asst. Atty. Gen., and *Oliver E. Pagan*.

Charles F. Choate, jr., of Boston (*Olcott O. Partridge*, of Boston, on the brief), for defendants Winslow, Hurd, and Brown.

Henry F. Hurlburt and *Boyd B. Jones*, for defendants Barbour and Howe.

William A. Sargent, of Boston, for all defendants.

[580] PUTNAM, Circuit Judge.

[1] These cases came before us on demurrer. They are indictments based on the act of July 2, 1890 (26 Stat. 209, c. 647), commonly known as the "Sherman Anti-Trust Act." No. 114 seems to be less complicated by special circumstances than No. 113. We will therefore take up that first. It contains two counts. The first is based on the second section of the act referred to, relating to monopolies, and the second on the first section, which declares illegal certain contracts and combinations or conspiracies in restraint of trade, and punishes "every person who shall make any such contract or engage in any such combination or conspiracy." The second section of the act impliedly permits an indictment for building up a monopoly, as well as inaugurating it or maintaining it, and therefore may relate to a series of acts following each other, all covered into one indictment or count, without the indictment or count being chargeable with duplicity. The offense under the first section permits in one count an allegation of only a

single transaction—that is, an allegation of making one contract, or engaging in one combination or conspiracy—so that while by virtue of the decisions of the Supreme Court in *United States* v. *Kissel*, 218 U. S. 601, 607, 31 Sup. Ct. 124, 54 L. Ed. 1168, and *United States* v. *Barber*, 219 U. S. 72, 78, 31 Sup. Ct. 209, 55 L. Ed. 99, such a combination or conspiracy, when once effected, may be continuous, yet only one contract or one conspiracy can properly be alleged in any one count. For this reason, as we go on, we will find that the second count, under the circumstances of the case, must be held invalid in law.

There is such a chaos of decisions in reference to the Sherman Anti-Trust Act, and such a chaos of understanding or misunderstanding with reference thereto, and this case apparently is regarded as of so important a character, that any conclusions a single judge may reach may prove of very little importance. It is not for the court here to judge of the possibility of a writ of error lying in these cases to the Supreme Court, but it is hoped by the court that such may be permissible. The court, moreover, cannot overlook the fact, in accordance with the practice shown in *United States* v. *N. Y., N. H. & H. R. Co.* (C. C.) 165 Fed. 742, decided on December 4, 1908, that the United States, under the act approved February 11, 1909 (32 Stat. 823 [U. S. Comp. St. Supp. 1909, p. 1211]), have the privilege of demanding, on a bill in equity, the constitution of a court of three judges to pass on the issues fundamentally involved here; of course, much broadened out and made much more certain as they would be on a bill in equity. Also, the court, having a right to know its own records, cannot overlook the fact that such a bill in equity is pending in this district, subject to be advanced for hearing in accordance with the statute last named. Nevertheless, the court, being appealed to as the parties have a right to appeal to it, must do its duty as best it can.

[2] It will turn out that, notwithstanding the apparent conflict, and as we say chaos, of decisions, there is a clear path through them all to a satisfactory determination of the fundamental question involved here. It may be found, however, that certain incidental matters are proposed as to

which there is uncertainty necessarily involved by rea-[581]son of the multiplicity of the allegations relating thereto; and as to these the court reserves to itself the right to appeal to *Kansas* v. *Colorado*, 185 U. S. 125, 145, 147, 22 Sup. Ct. 552, 46 L. Ed. 838. The rule there is stated with reference to suits in equity where the issues are raised on demurrer; but it is equally applicable, on fundamental principles, to a criminal proceeding. In complicated cases demurrers sometimes shut out the merits, and sometimes, so far as the case involved is concerned, bring before the court only a partial and inadequate view thereof. It is with great satisfaction that we may rely on the rule from Daniell stated in *Kansas* v. *Colorado*, 185 U. S. at pages 144 and 145, 22 Sup. Ct. at page 559, 46 L. Ed. 838, as follows:

"The pursuit of this course, on occasion, is thus referred to by Mr. Daniell (p. 542): 'The court sometimes declines to decide a doubtful question of title on demurrer, in which case the demurrer will be overruled, without prejudice to any question. A demurrer may also be overruled, with liberty to the defendant to insist upon the same defense by answer, if the allegations of the bill are such that the case ought not to be decided without an answer being put in. * * * A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this: That it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill and those established by the evidence may either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer.

The conclusion of the court, stated in 185 U. S. at page 147, 22 Sup. Ct. at page 560, 46 L. Ed. 838, was as follows:

"The result is that, in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence. Demurrer overruled, without prejudice to any question, and leave to answer."

There have been brought to our attention two decisions in this district, one of them, *Oliver* v. *Gilmore* (C. C.) 52 Fed. 562, rendered independently of any question arising under the statutes of the United States, and the other, *United States* v. *Patterson*, rendered June 1, 1893, reported in (C. C.) 55 Fed. 605, and again in (C. C.) 59 Fed. 280.

As the theory of the latter case has never been approved, we will not refer to it further; but the former case, *Oliver* v. *Gilmore*, deserves some consideration, as we will state later.

[3, 4] The incidental questions we will dispose of now. It is objected that the respondents are joined as officers of various corporations around which this litigation gathers, that one corporation is the principal, and that the respondents are only officers or directors thereof. The indictment, however, expressly charges them as actors, and two fundamental principles are thoroughly settled. One is that neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor; and the second is that all parties active in promoting a misdemeanor, whether agents or not, are principals. The rule distinguishing between directors of a corporation who are simply charged as such and directors acting an immediate, special part in the proceed-[582]ings in question, was pointed out and settled by the Circuit Court of Appeals for this circuit in *National Cash Register Company* v. *Leland*, 94 Fed. 502, 508, 509, 37 C. C. A. 372. Although that was a civil suit for damages on account of an infringement of a patent right, the principles apply here as well as there.

[5] Some questions are also made with reference to the method of setting out certain documents involved here. There are a great many documents all of the same class relied on by the United States. None of them is specifically described, nor any allegations beyond describing the substance thereof as understood by the United States. We may return to this later if we find it necessary; but all we need say at present is that, where whatever are involved are so numerous that they cannot be stated at length, or in detail, without incumbering the record to an extent beyond all practical rules of convenience, they may be stated generally. Also, as ruled by the Circuit Court of Appeals for this circuit in *Pooler* v. *United States*, 127 Fed. 509, 517, 62 C. C. A. 307, and by the Circuit Court in *United States* v. *Grunberg* (C. C.) 131 Fed. 137, 139, it is not ordinarily necessary to

set out an instrument by its tenor unless it becomes directly the subject matter of the litigation.

We will not notice particularly all the other propositions made by the respondents, which are numerous; but we will touch upon them so far as we think they require attention, grouping in our observations sometimes several minor propositions made by the respondents, classifying as far as possible those relating to similar topics.

The counts contained in each of the two indictments, which are based on the first section of the act in question, declaring illegal combinations or conspiracies in restraint of trade, are objected to, with several forms of expression of the objections, because they do not suitably charge in what manner interstate commerce was in fact unreasonably restrained. In this respect the respondents rely on expressions made by us in *United States* v. *John Reardon & Sons Company* (C. C.) 191 Fed. 454, 456, reference to the same statute now under discussion, to the effect that:

"The fundamental rule, which never has been overthrown by the Supreme Court, although there are undoubtedly numerous expressions which would seem to shake it, is that it is never sufficient to allege that an act is illegal, but the United States must allege something more which the court can see on the face of the indictment is illegal if the facts are proven as alleged."

[6] We stand firmly by this proposition; yet, as the offense under the first section requires only charging the combination in some form or other, with at most only an allegation of an overt act, it is not necessary to show that the purpose of the combination was accomplished, and therefore objections of the character just stated are not effectual. It is nevertheless objected that the methods contemplated by these combinations are not properly set forth within the general rule cited from our prior decision. We observe that, of course, while as with reference to other alleged criminal acts the intent must be sufficiently set out to show malice in fact or in law, so in these cases such intent must be set out; and this has been done. Of course, the court fully under-[illegible] the other settled rule of law that the use of [583] ad-[illegible] and adverbs, no matter how much reiterated, is not [illegible]t, although required; and also that facts enough

must be stated in detail to enable the court to determine for itself whether or not the alleged combination or conspiracy is to be carried out by what are in truth unlawful methods. We think as we leave this case it will be free from all objections in the latter behalf.

It was claimed at the arguments that there is not a sufficient allegation establishing the jurisdiction in this district; but it is plainly inferable from all that is stated in the indictment that the formation of the conspiracy was within this district. This topic, as thus presented to us, is within section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696), and is so far a matter of form that it should have been specially set out in the demurrer. Whether it was or not has not been brought to our attention.

It is also said that the United Shoe Machinery Company, the organization which lies at the basis of these indictments, was created under the laws of New Jersey, and that certain allegations with reference to its organization in the State of Massachusetts are repugnant; but the criminal law is not hampered by considerations of this character, and it looks through all such forms, regarding them rather as possibly ineffectual evasions.

[7] Also a question of constitutionality is raised on the ground that what is known as the Sherman Anti-Trust Act is too indefinite to lay the foundation of a criminal proceeding. It is true that the Constitution of the United States requires that, in all criminal prosecutions, the accused "shall be informed of the nature and cause of the accusation" (amend. art. 6), and that this applies, not merely to the information or indictment, but to the statutory provisions on which the proceeding is based. It must not be forgotten that the framers of the Constitution of the United States and of the earlier State Constitutions lived at a time when the recollection of the cruelties of tyrannical proceedings, and the suffering and injustice coming therefrom, were fresh, and, to a large extent, topics of consideration, and when the provisions of constitutional law necessary to protect against such had been thoroughly thought out. In this aspect the framers of these constitutions were vastly more alive to the necessity of provisions

of the kind we have quoted, and other like provisions, than the present generation. The favorite resources of tyrants were punishing alleged crimes which had no existence prior to the punishment, and arresting and holding in imprisonment for indefinite periods, and afterwards forfeiting both property and life, without furnishing those charged any knowledge of the charges laid against them; and the same men who framed these constitutions soon learned from immediate contact with the bloody revolution in France that, for all injustice and cruelties, excited or prejudiced multitudes are more pitiless than monarchs, emperors, czars, and all individual tyrants. Consequently, looking at the experience of our forefathers more than at our own, it is the duty of courts and of communities to stand firm in behalf of constitutional provisions such as we have quoted, and more especially in behalf of those dividing the [584] Government into departments as an absolute preventative against those who make charges, and prosecute them, becoming directly or indirectly the judges. We have lived in so much peace for more than a century under the protection of the constitutional provisions to which we refer that whole masses of citizens and some of their leaders are slumbering in reference to them, while our forefathers, who were brought into almost immediate contact with all the devices to which tyranny was accustomed, were fully awake. The courts, however, are not permitted to slumber. We nevertheless know of no case where statutes have been so general or loose as to have been held to violate the constitutional provision on which the respondents here rely. Moreover, the facts are supposed to be known to the respondents. They are chargeable also, according to the usual assumption of law, with knowledge of the law. Therefore, the facts being alleged in detail in the indictment, the respondents are supposed to be advised fully of what is intended to be charged against them. Certainly it is not so plain that the statute so violates the Constitution as to justify us in holding it unconstitutional in the absence of any adjudication by the Supreme Court.

Nevertheless, while in theory the respondents are chargeable as we say, yet, in fact, the practical application of this

branch of the law is very uncertain. The Supreme Court has undertaken to define it in part in *Oregon Steam Navigation Company* v. *Winsor*, 20 Wall. 64, 22 L. Ed. 315, already referred to, which in *Oliver* v. *Gilmore* (C. C.), 52 Fed. 562, already referred to, we supplemented by further classification. The history of the law as shown in these two cases, and also in the *Standard Oil Company* v. *United States*, 221 U. S. 3, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, is in a continuous state of development, and will undoubtedly so remain for an indefinite period. This makes it practically so indefinite, both under the statute in question and aside from it, that criminal prosecutions like this at bar impose great hardship by terrorizing very considerable portions of the community who have acted honestly, through the possible peril of enormous fines and terms of imprisonment even for very many years. Under the circumstances, we are unable to understand why the Department of Justice directs, and the President permits, criminal proceedings like this, until, in the particular case, the practical application of the statute has been settled by civil proceedings, in view especially of the fact that the flexible methods of bills in equity are capable of exploiting all doubtful questions much more thoroughly, and with more just results, than criminal proceedings.

The respondents claim that the indictments do not allege sufficiently that they were engaged in interstate commerce within the meaning of the Sherman Anti-Trust Act. They seem to rest this mainly upon the fact that they are leasing machinery instead of selling it; but this fails so entirely to impress us that we do not dwell on it. On the whole, we are not much impressed with the respondents' criticisms so far as they relate to mere matters of form, with a single exception, which we will immediately state.

Of course, in a case of this nature under a new statute, the prec[585]edents, whether in textbooks or decisions, do not furnish stand[illegible] forms of indictments, and there will be a great [illegible] expression and methods of arrangement [illegible] pleaders; but we are struck in [illegible] parent frankness on the part of

the United States in attempting to bring before us exactly the facts as they exist, or as they claim them to be, and we think they have done so. We may, however, as well say it now, that we must reject the third count in indictment 113. That count, with certain general statements, describes the pith of the alleged offense as follows:

"And under the circumstances and conditions in said first and second counts set forth with reference to said trade and commerce and the subjects thereof (the allegations of said first and second counts in that behalf, including the allegations as to knowledge, intent, and design on the part of said defendants, and as to methods adopted and used by them, being by reference incorporated into this count of this indictment as fully as if herein repeated)."

[8] Modern practice fully justifies references in the later parts of an indictment to earlier parts of the same indictment for the details of matters properly set out in the earlier parts, and this has been correctly done with reference to the second count in indictment 114; but this practice is subject to the fundamental rules of pleading that duplicity and repugnancies must be avoided. The trouble here is as follows:

We have studied the first and second counts in this indictment with the view of ascertaining the necessity of the second count and wherein it differs from the first count; and we have been unable in what study we have given them to analyze them with certainty in this respect. They are apparently looking generally to the same circumstances, so that all we have been able to do is to adopt the explanation of the United States in its supplemental brief in this respect. It alleges that the facts in the second count are substantially similar to those set out in count 1, with such changes as were necessary to charge a conspiracy to restrain the interstate trade of shoe manufacturers by restricting their liberty of purchase in the shoe machinery markets. The arguments at the bar, however, as well as the supplemental brief for the United States, give us the understanding, as in fact it is stated in that brief, that the merger described in the first count created a combination which improperly restrained the defendants themselves in the management of their respective portions of interstate commerce. Consequently the references to the first two counts inevitably in-

Opinion of the Court.

ject into the third count allegations which, combined into one count, involve serious difficulties arising from duplicity and repugnancies, inasmuch as restraint of commerce of manufacturers of machines as among themselves, and restraint of commerce generally with reference to purchases from those manufacturers, are in law essentially different things; and the facts leading up to them are therefore necessarily different in certain essential features. The respondents were entitled to meet in the third count clear and consist allegations in accordance with the fundamental rules of pleading. As this is not vouchsafed them, the third count of indictment 113 must be held, for these special reasons, insufficient in law.

[586] We have now reached the point where we can state the substance of what we have under consideration. The supplemental brief for the United States, filed by leave of court on February 21, 1912, says that the initial design of the respondents was to be carried into effect as follows:

> "Every count charges that such initial design was carried into effect by means (1) of the union of formerly independent units of interstate commerce in the United Shoe Machinery Company; (2) by means of the system of leases with their tying provisions."

No other fundamental propositions in this connection are stated; and in this particular the brief expresses a result which we had reached by sifting at the conclusion of the arguments made before us whatever was submitted to us therein. We will therefore confine our attention to these two elements, with some subordinate matters which we may feel called on to discuss.

The letter of the statute under consideration contains no qualification whatever, but is aimed at every contract in restraint of trade, and every monopoly, affecting interstate commerce. The only difference in the letter is that the second section, which relates to monopolizing, uses the words "in part," while the first section omits those words. Nevertheless, there can be no [illegible]tion that both sections, so far as this particular [illegible] to be construed in the same way. The w[illegible] not in the first section, because a [illegible] of trade in part is inev[illegible] of trade within the

letter of the section. Therefore, neither in determining the matters involved in this litigation nor in weighing the authorities pro and con can any distinction be made in that behalf. Nevertheless, in the other particulars, with reference to the letter of the statute, it is inevitable that there should be some qualification which does not appear on its face. Otherwise, contracts in restraint of trade, and also monopolies, which have always been regarded as innocent and useful, would be denounced to an extent which would demoralize commerce and utterly defeat the very purpose for which the statute was intended; that is, to advance commerce, and not to destroy it. Restraint is often mere regulation or temporary obstruction for the purpose of clearing out the channel, and letting the stream flow at full tide. In these particulars the law is not prophetic as to the results of what merchants and manufacturers propose, except so far as it can learn from experience; and in *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, 22 L. Ed. 315, already cited, the Supreme Court approved a contract which created a complete monopoly, so far as could then be foreseen, of steam navigation along the whole coast of California, and approved a contract restraining that trade for a specific number of years. This was an emphatic illustration of the condition of things which the Sherman Anti-Trust Act found; and the case demonstrates what mischief it might do if interpreted literally. Other examples in the same direction are always close at hand. *Oregon Steam Navigation Company* v. *Winsor*, *ubi supra*, contained several, including the suggestion at foot of page 67 of 20 Wall. (22 L. Ed. 315), in reference to portioning out the country in regard to a secret [587] formula, a suggestion carried into practical effect in *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67. *Oliver* v. *Gilmore*, already cited, and which we have said was based on *Oregon Steam Navigation Company* v. *Winsor*, is more abundantly illustrative, and attempts to classify. It is interesting in its description of the development of the law given by Lord Justice Fry, than whom no one in England knew it better, although it must be said that we have not advanced in the United States so far as the famous Mogul case (54 L. J. Q. B. 540).

[9] Independently of this, there is the well-settled rule that statutes are not to be interpreted to change the common law, except so far as a purpose so to do is necessarily implied. As said by Mr. Justice Brewer with reference to this same statute in *Northern Securities Company* v. *United States*, 193 U. S. 197, 361, 24 Sup. Ct. 436, 466 (48 L. Ed. 679), decided March 14, 1904:

"Whenever a departure from common-law rules and definitions is claimed, the purpose to make the departure should be clearly shown."

In fact, this rule of construction is so universally recognized, and so fundamental, that we need only call attention to it in this connection. The contrary understanding seems to have been a long time cultivated as a result of what appears in connection with *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, decided March 22, 1897, although it is sometimes said that that understanding was only the reporter's law, in view of the headnote stated as follows:

"The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable."

In this case of nine judges only five concurred in the result, one of whom was Mr. Justice Brewer; so that, at the best, the conclusion was that of only five judges against four. But Mr. Justice Brewer, in connection with the expression we have cited from him, vigorously maintained that, although he united with the majority in the Freight Association case, the statute in question was leveled only at unlawful restraints and monopolies; and he added that:

"Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable, and ought to be upheld."

He continued:

"The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon these contracts which were in direct restraint of trade, unreasonable, and against public policy."

Then follows what we have previously cited from him.

Opinion of the Court.

However, all this discussion is rendered unnecessary by the exposition of the law in *Standard Oil Company* v. *United States*, 221 U. S., 31 Sup. Ct., 55 L. Ed., 34 L. R. A. (N. S.), already cited, to the effect that the statute has not revoked the common law in the particulars of which we have spoken, but has left it as stated in *Oregon Steam Navigation Company* v. *Winsor*, and *Oliver* v. *Gilmore*, and by Mr. Justice Brewer in the citations made from him. This ap-[588]pears all through the opinion of the Chief Justice, but is intensified by the following references, to wit: Referring to the expressions found in the statute "restraint of trade" and "monopolies," it says in 221 U. S. at the top of page 51, 31 Sup. Ct. 512, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834:

"It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question."

Near the top of page 59 of 221 U. S., 31 Sup. Ct. 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, the opinion is more emphatic with reference to the common-law definitions, as follows:

"Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law, or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."

A full exposition is found in 221 U. S. on page 60, 31 Sup. Ct. on page 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, as follows:

"And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce, or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and

Opinion of the Court.

requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

In order, moreover, to understand what the opinion meant by its reference to the standard of reason which had been applied at the common law, and for which, unfortunately, the short expression "rule of reason" has been substituted we quote at length from 221 U. S. pages 58 and 59, 31 Sup. Ct. 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, as follows:

"Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public, and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this [589] country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England."

Returning for an instant to the short expression "rule of reason," found in the opinion from which we have quoted, which, without the context, is misleading, it simply is in line with what was said by Blackstone in an exaggerated [illegible]r, that some lawyers tell us that the law is the per[illegible]n of reason. It was merely a short way of expression [illegible] effect that the present state of the common law on that

topic is the result of development along reasonable lines, and hand in hand with modern commercial advance.

We are now in position to explain in detail the facts so far as they are concerned with the two principal points which we have to consider, namely, the fundamental nature of the original combination and the alleged abnormal and oppressive nature of the leases referred to. The facts as to the combination are alleged in the first count, indictment 114, to have been as follows, namely, the defendants—

"continuously and at all times during the period of time from the 7th day of February in the year of 1899 to the 19th day of September in the year 1911, and therefore continuously, and at all times during the three years next preceding the finding and presentation of this indictment, at said Boston, in the manner and by the means hereinafter described, unlawfully and knowingly have monopolized part of the trade and commerce among the several States of the United States—that is to say, the trade and commerce hereinafter mentioned and described, * * * and that continuously for many years prior to and throughout said period of time there has been carried on an extensive industry, consisting of the manufacture and sale of certain articles of merchandise, to wit, boots and shoes, in the following cities and towns in the several States of the United States, to wit."

Then follows a long list of the cities and towns referred to. The indictment then continues:

"Which said articles of merchandise, prior to and throughout said period of time, have been manufactured almost entirely by the aid and use of various kinds of essential machinery, which for the purposes of this indictment are grouped as follows:

"(Group I)—Lasting Machines—The machines included in this group are designed and used for the purpose of lasting the uppers of shoes.

"(Group II)—Welt Sewing Machines and Outsole Stitching Machines—The machines included in this group are designed and used for the purpose of sewing the seam which attaches the upper to the outsole of a turn shoe, and the seam which attaches the upper and welt to the insole of a welt shoe, and for sewing the welt of a welt shoe to its outsole.

"(Group III)—Heeling Machines—The machines included in this group are designed and used for preparing and attaching the heels of shoes.

"(Group IV)—Metallic Fastening Machines—The machines included in this group are designed and used for the purpose of preparing and inserting metallic fastenings in shoes."

Opinion of the Court.

The indictment then further states facts as follows:

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that for many years prior and down to said seventh day of February, [590] in the year eighteen hundred and ninety-nine, several separate corporations, operating independently and in competition with each other, were engaged in trade and commerce among the several States of the United States in the sale and lease of the machines included in said groups of shoe machinery, and that among the said corporations engaged in said industry were the following, to wit:

"Goodyear Shoe Machinery Company, corporation of the State of Maine, with its principal factory at said Boston, was engaged in interstate trade and commerce in the sale and lease of machines designed and used for the purpose of sewing the uppers to the soles of shoes, and machines designed and used for the purpose of lasting the uppers of shoes. The said machines are included in groups I and II, aforesaid.

"Consolidated & McKay Lasting Machine Company, corporation of the State of Maine, with its principal factory at Beverly, in said district of Massachusetts, was engaged in interstate trade and commerce in the sale and lease of machines designed and used for the purpose of lasting the uppers of shoes. The said machines are included in group I, aforesaid.

"McKay Shoe Machinery Company, corporation of the State of Maine, with its principal factory at Winchester, in said district of Massachusetts, was engaged in interstate trade and commerce in the sale and lease of machines designed and used for preparing the heels and for attaching them to shoes, and in the sale and lease of machines designed and used for the purpose of metallic fastenings. The said machines are included in groups III and IV, aforesaid.

"Eppler Welt Machine Company, corporation of the State of Maine, with its principal place of business at said Boston, was engaged in interstate trade and commerce in the sale and lease of machines designed and used for the purpose of sewing the uppers to the soles of shoes, which said machines were particularly adapted to the manufacture of welt and turn shoes. The said machines are included in group II aforesaid.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that prior to and until said seventh day of February, in the year eighteen hundred and ninety-nine, the several companies hereinbefore mentioned and described, sold and leased in the aggregate eighty-five per cent of all the machines included in all of said groups of [illegible] so sold and leased to manufacturers of [illegible] in the several States of the United States, but [illegible]panies sold and leased or controlled the sale [illegible] of all the machines included [illegible]

Then follow allegations that prior to the 7th of February the several respondents were severally engaged in promoting the groups already referred to, and which are concerned. Then the indictment proceeds as follows:

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that on said seventh day of February, in the year eighteen hundred and ninety-nine, said defendants Sidney W. Winslow, William Barbour, Edward P. Hurd, Elmer P. Howe, George W. Brown, and James J. Storrow, in pursuance of agreements among them to eliminate all competition, which, for a number of years prior to said date, had existed among said Consolidated and McKay Lasting Machine Company, Goodyear Shoe Machinery Company, McKay Shoe Machinery Company, and Eppler Welt Machine Company, and as a device and means for monopolizing, and whereby they have monopolized the trade and commerce among the several States of the United States in the sale and lease of the machines included in each and all of said groups of shoe machinery, caused to be organized and took an active part in the organization of United Shoe Machinery Company, a corporation, under the laws of the State of New Jersey, hereinafter in this count of this indictment referred to as United Company, with broad powers under its charter to manufacture, buy, sell, lease, operate, and deal in and with all kinds of machinery, tools, and implements, and especially in everything in any way connected with or useful in the manufacture of shoes, which said United Company, either imme[591]diately or soon after its organization, acquired and took over (the exact date of such acquisition being to the grand jurors unknown) substantially all of the capital stock and the business and assets of each said Consolidated and McKay Lasting Machine Company, Goodyear Shoe Machinery Company, McKay Shoe Machinery Company, and Eppler Welt Machine Company, by means of the issue and exchange of the capital stock of said United Company.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said defendants, through said United Company, after its organization, to wit, on or about said seventh day of February, in the year eighteen hundred and ninety-nine, and upon the acquisition by said United Company of substantially all of the capital stock and of the business and assets of each said Consolidated and McKay Lasting Machine Company, Goodyear Shoe Machinery Company, McKay Shoe Machinery Company, and Eppler Welt Machine Company, then acquired control of eighty-five per cent of the trade and commerce among the several States of the United States in the sale and lease of each and every machine included in each and all of [illegible] groups of shoe machinery."

The indictment further alleges:

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that said defendants have, throughout said period of time, carried on, directed, and controlled, and caused to be carried on, directed, and controlled their said trade and commerce in the sale and lease of the machines included in said groups of shoe machinery, by the device and means of and through and in the names of said United Company, corporation as aforesaid, and United Shoe Machinery Corporation, a corporation of the State of New Jersey, and through certain other corporations which said defendants dominate and control."

Then follows a list of minor companies of which the United Shoe Machinery Company is said to have obtained control.

The foregoing completes the picture of the combination sought to be penalized under the Sherman Anti-Trust Act. It is to be noted that this count of indictment 114 claims that the combination of the four groups of machinery which we have described was intended to suppress competition; but the detailed facts therein overrule this alleged purpose, and shut out suggestions of an intention in the way of suppressing competition, as we will show.

[10] The alleged agreement was the combination of several interests controlling the various groups I, II, III, and IV. Admitting that each was controlled by a separate organization without any cross-holding, it would have been clear that the result would have been simply a union of four different industries, not competing, but supplementing each other. A careful examination of the record shows, however, that, although the Goodyear Company, the McKay Shoe Machinery Company, the McKay Lasting Company, and the Eppler Welt Company nominally controlled independently of each other shares in the business to which groups I and II were related, yet the cross-holdings of the respondents in these corporations prevented any competition prior to February, 1899, so that the status was the same as though groups I and II formed one group, and only groups III and IV were separate and independent groups. No complaint whatever is made [illegible] indictment of the grouping in the way stated; [illegible] of illustrating our line of reasoning [illegible], we will add here that in indictment [illegible] to [592] assume that the various

machines to which these indictments relate were covered by patents, it is expressly admitted that the original groups I, II, III, and IV controlled monopolies, and that yet those monopolies were not of an illegal character.

Taking up again the second count in indictment 114, which refers back for all details to the first count, it plainly alleges only a conspiracy. It states that the respondents "unlawfully and knowingly conspired to monopolize." This expression is plainly adapted to a combination only. Therefore we accept this count as such, leaving the first count of indictment 114, which we will approach later, as alleging a completed monopoly under the second section of the act.

Coming back, therefore, to the proposition that the second count alleges only a conspiracy, the rules of pleading confine it to one conspiracy. As said in *United States* v. *Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168, ubi supra, and according to the clear rules of law, it may well be regarded as a continuous conspiracy. Nevertheless, as was said in 218 U. S. on page 608, 31 Sup. Ct. on page 126, 54 L. Ed. 1168, "the contract is instantaneous," though "the partnership may endure as one and the same partnership for years"; adding, "a conspiracy is a partnership in criminal purposes." Therefore it follows that the whole offense under the second count of indictment 114 is a combination formed on the 7th day of February, 1899, with the purposes and intentions then existing which we have described, and nothing more. This combination, then formed, was purely an economic arrangement, not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court, as is shown by an examination of all the cases decided by that tribunal.

It seems to be impossible to deny that the combination of various elements of machinery, all relating to the same art and the same school of manufactures, for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system, is in strict and normal compliance with modern
...ses; as also it might be in strict compliance with
...agrees to limit the manufacture and supply to

certain details, as for example, steam gauges, wheels for railroad cars, or axles for steam locomotives, without furnishing anything else, although by so doing the manufacturer of details becomes able to command the entire market. It is absolutely normal, and in accordance with the rightful demand of the market, for any dealer to supply mere details of an entire system of machinery, according as his customers may desire.

Such being the fact, the law as explained by Chief Justice White in 221 U. S. at page 58, 31 Sup. Ct. at page 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, of *Standard Oil Company* v. *United States*, has kept hand in hand with "developing trade." The great leaps which the law has made in this direction, and the reasons why it has made them, is pointed out in many cases, especially in *Gibbs* v. *Gas Company*, 130 U. S. 396, 409, 9 Sup. Ct. 553, 32 L. Ed. 979, where the leap was from *Mitchell* v. *Reynolds*, 1 P. Wms. 181, limited to a **[593]** single town or city, to *Rousillon* v. *Rousillon*, 14 Ch. D. 351, which covered the whole of Europe as we remember it. At any rate, it covered practically an unlimited territory. In the same line is the distinction made by the Chief Justice in *Standard Oil Company* v. *United States*, that the unification of power and control over petroleum there under discussion was due "to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to with the purpose of excluding others from the trade."

So also in *United States* v. *American Tobacco Company*, 221 U. S. 106, at page 182, 31 Sup. Ct. 632, at page 649 (55 L. Ed. 663), the Chief Justice distinguished as follows:

"We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations."

Then follows a number of specifications, among which is this:

"By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for purposes of trade."

We have examined every decision of the Supreme Court bearing on these topics. Some of them, like *Gibbs* v. *Gas Company*, 130 U. S. 396, 409, 9 Sup. Ct. 553, 32 L. Ed. 979, already referred to, and the *Freight Association case*, 166 U. S. 290, 335, 17 Sup. Ct. 540, 41 L. Ed. 1007, were decided, or might have been, on the ground that they involved agreements for the suppression of corporations having a public character, which agreements are clearly illegal all over New England. All the other decisions involved a well-known rule which prohibits stifling bids and portioning out territory arbitrarily. In this is included *Oregon Steam Navigation Company* v. *Winsor*, already cited, with reference to the excess period of three years explained therein. None of them penalize a combination like that originally formed in the present case. Therefore we cannot adjudge it invalid.

The first count of indictment 114 reaches the case of an alleged completed monopoly, which, therefore, may include everything, not only the original combination, but whatever occurred down to the time of the finding of the indictment. There are numerous minor matters here which are not covered by either of the two propositions which we have said were specially brought forward in the supplemental brief of the United States; as, for example, the acquiring the "Thomas G. Plant" assets, and several minor corporations. These are only the results, and of themselves add nothing except by way of illustration and aggravation.

What was thus referred to in the supplemental brief of the United States are leases which are declared to be "arbitrary, opppressive, and unreasonable." The alleged illegal purpose of the leases is set out [594] at full length, and they are denounced as unlawful devices for eliminating competition. It is also urged that, as a result of these leases, in

combination with the four groups consolidated as alleged, the respondents have dominated 98 per cent of the business to which these groups related. We do not attach much importance to this percentage, because that, standing alone, is like one of the terms of an aglebraic equation, which of itself is non-efficient. As said in *Oliver* v. *Gilmore*, ubi supra, a manufacturer or merchant may, by the mere fact of the quality of his goods, monopolize the market, which is permissible; as, for illustration, one of these indictments describes the respondents' machines as the best put on the market.

[11] The leases referred to here are the same as those approved in the appeal of *United Shoe Machinery Company* v. *Brunet* (1909) App. Cas. 330, where the Privy Council decided that the whole combination exhibited here, including leases, was valid. Notwithstanding the decisions of the Privy Council are not authoritative, even in England, like those of the King's Bench, yet the members of the judicial committee who sat on this appeal were Lords MacNaughton, Atkinson, Collins, and Gorell, making an exceedingly strong court, hardly to be surpassed in England. Therefore we would be free to follow it if the background was the same here as there. But it is not. There the background was the special findings of a jury, here the indictments allege features going towards making up an illegal monopoly, which are not clearly inoperative on their face; so that we must fall back upon the rule we have cited from *Kansas* v. *Colorado*, 185 U. S. 125, 145, 147, 22 Sup. Ct. 552, 46 L. Ed. 838. We can easily see that the result of the trial of the issues of fact might remove the apparent illegality arising from these leases; but the case is not so clear that we can sustain the demurrer with reference to the first count of indictment 114. Therefore on the demurrer we hold the second count of indictment 114 invalid, and the first count thereof valid, unless on a trial it appears that the leases we refer to are found to add no obnoxious feature.

Indictment 113 is easily disposed of. We have already shown that the third count is invalid. The first and second counts are invalid for the same reason which invalidates the

second count of indictment 114. This indictment 113 was evidently framed to bring out the question whether the fact that various machines manufactured by the United Shoe Machinery Company are protected by patents in whole or in part is of importance in this connection. As the result we reach cuts under this question, we prefer to postpone its consideration, hoping that the Supreme Court may have to dispose of it in some way before we are forced to proceed with it if ever.

The general result is that on the face of the record we hold the original agreement of consolidation valid, and that on the pleadings we adjudge the condition arising from the subsequent adoption of the leases in question leaves the first count of indictment 114 not subject to demurrer.

The judgment in 113 is as follows:

The indictment is adjudged insufficient in law; the demurrer thereto is sustained; and the respondents go therefrom without day.

[595] The judgment in indictment 114 is as follows:

The first count is adjudged sufficient in law; and the demurrer thereto is overruled; and the respondents are given leave to plead anew on or before the first day of the March term, 1912. The second count is adjudged insufficient in law; the demurrer thereto is sustained; and the defendants go therefrom without day.

ON PETITION FOR REHEARING.

The respondents filed a petition for rehearing, probably claiming it as a matter of right under rule 16; at any rate, we accept it as such. We have to-day entered an order denying the same. Ordinarily it is not desirable to file opinions with reference to such orders, but in the present case one may be advisable.

The petition relies on two propositions: One is that there is an inconsistency on the part of the court in reference to pleading the leases relied on in the indictment. We regret that, instead of quoting authorized expressions, we used a phrase which we thought was substantially clear, and thus, perhaps, misled counsel. Therefore we will repeat in lan-

guage found in any edition of Archbold's Criminal Pleading, as follows:

"At common law, written instruments, wherever they formed a part of the gist of the offense charged, must be set out verbatim."

Nowhere is it attempted to apply this rule, except with the limitation thus stated. Both the examples given by Archbold, and by other authorities, and what the courts learn by experience in the practical application of this rule, should satisfy any one that the instruments referred to in this petition do not form a part of the gist of the offense charged. Moreover, the petition overlooks the fact that there is another rule which we applied, which is that the multiplicity of the instruments to which the indictment refers rendered it impracticable to plead them except in a general way.

The other alleged error to which the petition relates is that the first count of the indictment No. 114 so far developed rights covered by letters patent as to bring the case within *Henry* v. *Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, decided by the Supreme Court in the opinion handed down on March 11, 1912. The only point there decided was to affirm a rule with reference to rights of patentees which has been accepted by us since the topic came under discussion; and, as we understand, is as is generally held in this circuit. The line of reasoning in the opinion perhaps develops propositions which may or may not be available for the respondents in defense on a trial of issues of fact, if there is one, under the count indictment No. 114, to which the petition relates, but they are not available on the face of that count.

It ought to be enough to say that at the hearing on the demurrers, to which it must be admitted we gave patient attention, it was not submitted to us that this count in indictment No. 114 showed that the respondents had any peculiar rights or defenses arising out of the patent laws. Even this petition makes a clear distinction between this indictment and the indictment No. 113. This is not only in ac[596]cordance with our recollection of the presentation of the case when brought before us, to which it must be admitted we

gave the most careful attention; but also it is sustained by one of the briefs for the respondents submitted at that time, wherein, with reference to indictment No. 113, it was stated that all the machines referred to therein were expressly alleged to be covered by letters patent, while the same brief, with reference to indictment No. 114, stated only that its allegations led almost conclusively to the establishment of the proposition that the business was based on patents. According to the fixed rules of criminal pleadings, matters "expressly alleged" and those allegations which lead "almost conclusively" are so wide apart that they are not in the same field at all.

Indictment No. 113 alleges expressly again and again that specific machines are covered by letters patent. On this point the petition before us invites us, at large, to examine five pages, 26, 27, 28, 29, and 30, in indictment No. 114, and again three pages and again four pages, leaving us to search out what the respondents rely on. This is calling on the court for an abuse of time which counsel of the distinction and experience of those at bar should never have done. The court refuses to undertake the task, beyond turning up page 26 referred to, where there is a general charge that the corporation controlled by the respondents acquired "assets and letters patent" without any further specification. As far as the court recollects, there is nothing more definite anywhere in indictment No. 113. This, of course, is not effectual on the proposition now brought before us; and this distinction between No. 114 and No. 113 clearly justifies us in holding that there was no intention at the trial of these demurrers to bring before us the proposition now made. The respondents at that trial had their hearing and their full day at court, and must be content therewith.

On the whole, we repeat that we left the indictment as to which the respondents now complain in the condition which we described in our reference to *Kansas* v. *Colorado*, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838; and we are not willing to be turned aside from that position by any further discussion. We must in any view deny the petition.

Syllabus.

UNITED STATES *v.* WINSLOW.[a]

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 620. Argued January 10, 1913.—Decided February 3, 1913.

[227 U. S., 202.]

On appeals under the Criminal Appeals Act of 1907 this court has no jurisdiction to review the interpretation of the indictment by the lower court, *United States* v. *Patten*, 226 U. S. 525, and if that court has construed the count as alleging a combination of a particular date to be in violation of the Sherman Law, without regard to subsequent acts, this court cannot pass upon the validity of those acts.[b]

A combination for greater efficiency does not necessarily violate the Sherman Anti-Trust Act.

Where each of several groups are carrying on a legal business of making patented machines which do not compete with each other, although the machines of all the groups are used by manufacturers of the same article, such as shoes, a combination of the several groups does not violate the Sherman Anti-Trust Act.

Exclusion of competitors from making the patented article is of the very essence of the right conferred by the patent.

Where the share in interstate commerce does not appear in the record, and the machines in question are not alleged to be types of all the machines used in manufacturing the article for which they are made, the Government cannot claim that a specified proportion of the business was put into a single hand.

The disintegration aimed at by the Sherman Anti-Trust Act does not extend to reducing all manufacture to isolated units of the lowest degree.

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, is a special provision and, as it is not mentioned in the repealing section of the Judicial Code of 1911 and is not superseded by any other regulation of the matter, it was not repealed by the Judicial Code. *United States, Petitioner*, 226 U. S. 420.

The District Court rightly held that the counts under review of the indictment against various persons for combining their businesses of [203] manufacturing patented machines for making different parts of shoes, and not competing with each other, did not constitute an offense under the Sherman Anti-Trust Act.

195 Fed. Rep. 578, affirmed.

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[a] For opinion of District Court, sustaining, in part, demurrers to indictments (195 Fed. 578), see *ante*, page 170.

Argument for the United States.

[57 L. Ed., 481.*]

APPEAL—BY GOVERNMENT IN CRIMINAL CASE—SCOPE OF REVIEW.—1. The District Court's construction of the indictment must be accepted by the Federal Supreme Court when reviewing, under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564), a judgment sustaining a demurrer to certain counts in the indictment, which is based upon the construction of the Federal statute upon which the indictment is founded.

For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.

MONOPOLY—RESTRAINT OF TRADE IN PATENTED ARTICLES.—2. The union in one corporation of three companies, each manufacturing a different non-competing group of patented machines collectively used for making shoes, is not forbidden by the prohibitions of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), against combinations in restraint of interstate trade, although a large percentage of all the shoe machinery business may thus have been put into a single hand.

For other cases, see Monopoly, II. b, in Digest Sup. Ct. 1908.

APPEAL—BY GOVERNMENT IN CRIMINAL CASE—REPEAL.—3. The Criminal Appeals Act of March 2, 1907, was not repealed by the Judicial Code of March 3, 1911 (36 Stat. at L. 1087, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 128), since the former act is not mentioned among the statutes expressly repealed by § 297 of the Code, is not superseded by any other regulations of the matter, and is a special provision.

For other cases, see Appeal and Error, I. e; Statutes, III. b, in Digest Sup. Ct. 1908.

The facts, which involve the construction of the Sherman Anti-Trust Act, and determining whether the combination charged in an indictment thereunder of various manufacturers of patented shoe machinery constituted a violation thereof, are stated in the opinion.

The Solicitor General for the United States:

This case presents the question whether it is legal to gather together into one corporation about 80 per cent of all the interstate trade in some particular line of activity when it is

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* The paragraphs following, in brackets, comprise the syllabus of the case as reported in Volume 57, page 481, Lawyers Edition, Supreme Court Reports.

done gradually by legitimate methods and without any unfair competition such as characterized the Tobacco and Standard Oil cases. If that is legal, the sooner the business world understands it the better.

The indictment alleged that three separate groups of individuals (each controlling a different group of machines essential to the manufacture of shoes), combined together whereby their separate businesses were combined into one under the joint management of these individuals; that each of the separate groups controls about 70 or 80 per cent of the interstate trade in the particular kind of machines manufactured by it; and that by the combination there were placed into one hand from 70 to 80 per cent of all the business in those kinds of shoe machinery manufactured by the defendants.

The constitutionality and sufficiency of the criminal provisions of the Sherman Anti-Trust Act are settled. *United States* v. *Kissel*, 218 U. S. 601; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 401; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 69; *United States* v. *Swift*, 188 Fed. Rep. 92.

[204] Individuals are subject to indictment for acts done under the guise of a corporation where the individuals personally so dominate and control the corporation as to immediately direct its action. *United States* v. *Swift*, 188 Fed. Rep. 92, 98; *United States* v. *McAndrews & Forbes Co.*, 149 Fed. Rep. 823; *Crall* v. *Commonwealth*, 103 Virginia, 855, 859, 860; *People* v. *Clark*, 8 N. Y. Crim. Rep. 179, 194, 195, 212; *People* v. *White Lead Works*, 82 Michigan, 471, 479; *People* v. *Duke*, 44 N. Y. Supp. 336, 337–339; *State* v. *Great Works &c. Co.*, 20 Maine, 41; *United States* v. *Durland*, 65 Fed. Rep. 408, 415; *S. C.*, 161 U. S. 306; *Balliet* v. *United States*, 129 Fed. Rep. 689; *Fitzsimmons* v. *United States*, 156 Fed. Rep. 477, 481; *Foster* v. *United States*, 178 Fed. Rep. 165, 173, 176–178; *La Societe Anonyme &c.* v. *Panhard Motor Co.* (1901), 2 Ch. 513, 516–517.

Prior to February 7, 1899, competition with reference to different kinds of shoe machinery was so distributed different groups of defendants and the Ind

pendents that a shoe manufacturer had 24 different choices for obtaining shoe machinery.

By the organization of the United Shoe Machinery Company and the coalescence into one of the three groups of businesses formerly carried on separately by the defendants, the variety of choice open to a shoe manufacturer for obtaining the necessary shoe machinery was reduced from 24 ways to 16 ways.

The defendants then adopted what is known as the "tying" clause lease, which provided that any shoe manufacturer using any one class of machines furnished by the defendants should use for all his other machines only those furnished by the defendants; and that if he used any machine made by an Independent, the defendants would forfeit his lease and remove his machines. This form of lease immediately reduced from 16 to 2 the different ways by which a manufacturer could equip his factory, so that he had to get all his machinery from the defendants or get it all from the Independents.

[205] The effect of the combination was to place from 70 to 80 per cent of all the shoe-machinery business (in so far as it related to those essential machines known as the lasting, welt-sewing, heeling, and metallic fastening machines) into one hand. This combination into one group of four non-competitive businesses (which, taken together, constitute one complete business) curtailed the customer's liberty of action by compelling him to deal with one and the same group as to all four classes of machinery, whereas formerly he could deal with four separate groups. The question presented, then, is whether the combination into one group of 75 per cent of the whole business of the country in a particular line is in such restraint of trade as to violate the Sherman law, it being conceded that the combination was not attended by any methods of unfair competition or illegitimate trade practices. Without attempting to determine exactly at what percentage of trade control a combination passes into the region of illegal restraint, the Government insists that when a combination acquires between 70 and 80 per cent of the total trade in a particular business, the line between legal and illegal combinations has been passed; and

that this is so even though the combination is made without resorting to any wrongful methods to coerce anyone to come into the combination. *Swift* v. *United States*, 196 U. S. 375; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *The Reading Co.*, 226 U. S. 324.

The adoption by the United Shoe Machinery Company of the "tying" clause lease whereby a customer was compelled to take all his machines from the defendants or all from the Independents was a direct restraint upon competition and trade (1) of the defendants by limiting their trade to those who would agree to use only the de-[206]fendants' machines; (2) of the customers by depriving them of the right to use some machines unless they would also use others, (3) of the Independents by preventing them from selling their machines to their former customers. *Montague* v. *Lowry*, 193 U. S. 38; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *The Reading Co.*, 226 U. S. 324.

The patent laws do not authorize the "tying" clause leases.

The precise point decided in *Henry* v. *Dick Co.*, 224 U. S. 1, was that a patentee might impose a restriction that his machine should be used only in connection with certain supplies which in point of fact bore so direct a relation to the invention that it could not be operated without their use in physical connection with the patented machine.

The doctrine of *Henry* v. *Dick Co.* should not be extended to permit a license restriction beyond the actual use of supplies in connection with the necessary physical operation of the patented machine. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20.

[illegible] if the doctrine of *Henry* v. *Dick Co.* is extended [illegible] of permitting any kind of restriction

upon the use of a patented machine, yet when such restrictions are a part of one general scheme of combination the patent laws no longer authorize such restrictions. The rights given by the patent laws do not give universal license against the positive prohibitions of the Sherman Law, which is a limitation on all rights that might otherwise be pushed to evil consequences. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *The Reading Co.*, 226 U. S. 324.

The Criminal Appeals Act, 34 Stat. 1246, was not repealed by the adoption of the Judicial Code.

[207] The defendant's right of appeal to the Supreme Court was given in the fifth and sixth sections of the Circuit Court of Appeals Act which, in the proposed revision of the laws of the United States, was placed in chapter 10 on the "Supreme Court," in the title called "The Judiciary." The right of the *United States* to appeal to the Supreme Court was contained in the Criminal Appeals Act, which, in the same proposed revision was placed in chapter 18 on "Procedure on Error and Appeal."

Congress, in passing the Judicial Code, did not attempt to cover the whole body of the revision submitted to it, but only adopted the first 14 chapters of the title "The Judiciary"; so that while it incorporated into the Judicial Code, chapter 10, on the "Supreme Court" giving the defendant a right to appeal, it did not attempt to cover any of the field embraced in the later chapters of the revision. Therefore, those subjects, *inter alia*, which were dealt with in proposed chapter 18 were never even considered by Congress and therefore remained controlled by the former laws governing them—one of which was the Criminal Appeals Act. (Cf. Committee Report of 1907 of "Commission to Codify and Revise the Laws of the United States" and the Joint Committee of Congress' Revision of 1910. See Title XVI, "The Judiciary," chapters 10 and 18).

Mr. Frederick P. Fish and *Mr. Charles F. Choate, jr.*, with whom *Mr. Malcolm Donald* and *Mr. William A. Sargent* were on the brief, for defendants in error:

Only a single question is presented by the case.

Argument for Defendants.

The lease question is not before this court, as hereinafter shown.

The fact that the machines manufactured by the United Shoe Manufacturing Company are protected by letters patent was not considered by the District Court in its construction of the Sherman Act, and is not open in this court.

[208] The facts alleged in the first and second counts are not brought out or are erroneously stated by the United States.

The second count is almost identical, word for word, with the first count, except as to the allegation in regard to interstate commerce, and changing the charge of combination of defendants' own trade into one of conspiracy to restrain the trade of shoe manufacturers in shoe machinery.

On this writ of error, the question is whether the District Court erred in the construction of the Anti-Trust Act in sustaining the demurrers to counts one and two and so far as that act is construed by the District Court in its opinion relating to those two counts.

For construction of the Criminal Appeals Act as applied to the question before this court, see *United States* v. *Bitty*, 208 U. S. 393; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Mason*, 213 U. S. 115; *United States* v. *Mescall*, 215 U. S. 26; *United States* v. *Stevenson*, 215 U. S. 190; *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Miller*, 223 U. S. 599.

The District Court decided the two counts now before this court were bad for duplicity in pleading, that is to say, on a question of general law not involving the construction of the Sherman Act, and that cannot be reviewed here. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Mason*, 213 U. S. 115; *United States* v. *Mescall*, 215 U. S. 26; *United States* v. *Stevenson*, 215 U. S. 190.

The District Court also held the two counts bad on a second ground, namely, that the original organization of the company was neither a combination in restraint of trade nor a conspiracy in restraint of trade under the Sherman Act. By such decision the District Court construed the Sherman Act.

Argument for Defendants.

The Criminal Appeals Act of 1907, under which the present writ of error was brought, was repealed by the [209] Judicial Code which became effective January 1, 1912, and therefore this court has no jurisdiction, as the writ of error was filed after that date. *United States* v. *Stevenson*, 215 U. S. 190.

The fact that the machines manufactured by the company are protected by letters-patent was not considered by the District Court in its construction of the Sherman Act, and is not open in this court.

The District Court was not in error in its construction of the Sherman Act in relation to counts one and two.

The organization of the company by said defendants together, and the turning over by said groups of defendants to and the taking over by the company of the stocks and business of the three corporations, was not, and is not, a combination in restraint of defendants' own trade nor a conspiracy in restraint of trade of the shoe manufacturers in shoe machinery. *United States* v. *American Tobacco Co.*, 221 U. S. 106.

By the organization of the United Shoe Machinery Company there was no restriction of competition. The three groups of defendants, prior to the organization of the company, were not engaged in competition with each other. Their businesses were absolutely different, and each business related to a different commodity. *Kokomo Fence Machine Co.* v. *Kitselman*, 189 U. S. 8; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Northern Sec. Co.* v. *United States*, 193 U. S. 197; *Montague* v. *Lowry*, 193 U. S. 38; *Miles Medical Co.* v. *Park Co.*, 220 U. S. 373; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Continental Wall Paper Co.*, v. *Voight*, 212 U. S. 227; *U. S. Machinery Co.* v. *La Chapelle*, 212 Massachusetts, 467; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *John Reardon Co.*, 191 Fed. Rep. 454; *Standard Sanitary Co.* v. *United States*, 226 U. S. 20; *United States* v. *Un. Pac. R. R. Co.*, 226 U. S. 61; *United States* v. *Terminal R. R. Ass'n*, 224 U. S. 383; *United States* v. *Reading Co.*, 226 U. S. 324.

[210] By the organization of the company the defendants, taken individually, or in groups, or together, did not agree

to restrain such trade as they had in different commodities, or in any manner to restrain their own trade. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Montague* v. *Lowry*, 193 U. S. 38; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; *Ellis* v. *Inman*, 131 Fed. Rep. 182; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Blount Mfg. Co.* v. *Yale Mfg. Co.*, 166 Fed. Rep. 555; *United States* v. *Trans-Missouri Ass'n*, 166 U. S. 290; *Swift & Co.* v. *United States*, 196 U. S. 375; *Miles Medical Co.* v. *Park Co.*, 220 U. S. 373; *United States* v. *Standard Sanitary Co.*, 191 Fed. Rep. 172; *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721.

The combination created by the organization of the United Shoe Machinery Company was purely an economic arrangement, not in violation of any rule in restraint of trade at common law, or which has been announced by the Supreme Court. *Joint Traffic Case*, 171 U. S. 505.

The combination of businesses, each dealing with a different commodity, into one corporation, has never been held a restraint of trade either at common law or under the Sherman Act. *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Reading Co.*, 226 U. S. 324; *Union Pacific Coal Co.* v. *United States*, 173 Fed. Rep. 737; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 177.

That the District Court was right in the only construction of the Sherman Act now before this court, to wit, in holding that the organization of the United Shoe Machinery Company was not within the purview of the Sherman Act, is further apparent from the fact that such organization of the United Shoe Machinery Company had no direct or immediate effect upon interstate commerce. If it had any effect at all upon interstate com[211]merce, such effect was accidental, secondary, remote, and not even probable. *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721; *Anderson* v. *United States*, 171 U. S. 604; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

Whether these lease provisions are or are not in restraint of trade is not before this court for several reasons; these defendants are not indicted for making these lease provisions; the language of the indictment in regard to these leases shows it; the act of the defendants in relation to these lease provisions is only an overt act, and only one of three or four overt acts named in the same paragraph of indictment; the combination and conspiracy are each absolutely complete without this overt act; the leases are not a part of the combination or conspiracy. No original intent to change leases is shown or any agreement to do so; the leases are not part of the original combination or conspiracy because between different parties; the question is one of duplicity on the theory of the United States; the lease provisions in these two counts were not construed or passed upon by the District Court; if the lease provisions had been involved here, the District Court would have considered the patent law.

The entire argument of the United States in regard to the business of these defendants and of the corporation is based on the erroneous view that the machines of the defendants were all the machines used in shoe making, and as a corollary to the above, the United States says that the defendants control between seventy and eighty per cent of the entire shoe machinery business in the United States.

On this record the particular form of the organization of the company, and the taking over of the capital stocks and business of the three original corporations is immaterial.

Indictment 113 was dismissed by the District Court for [212] duplicity and it should be explained why the second count of indictment 114 was not brought to this court by the United States.

The defendants are not indicted for dominating the supply of shoe machinery. *Reading R. R. case*, 226 U. S. 324.

The argument of the United States fails absolutely, because the defendants are not indicted for dominating the supply of shoe machinery; so also as to the alleged competition before the date of the organization of the company and the alleged competition thereafter.

The argument of the United States as to the effect of the organization of the United Shoe Machinery Company is absolutely fallacious.

The particular patented machines of these defendants are not indispensable to the manufacturer of shoes by the admission of the United States in its brief; in fact, the dissatisfied shoe manufacturer mentioned by the United States is better off after the organization of this company than before.

The organization of the company did not compel the customer to deal with the same group as to the four classes of machinery. All of the cases cited by the United States in this section of its brief relate to combinations of competitors dealing in the same commodity.

It is to be remembered that defendants are not indicted for monopolizing; that defendants' machines are patented and they are entitled to one hundred per cent of the trade therein.

The merger of the three companies was lawful and proper. The leases form no part of the merger and are not pertinent to this discussion.

No express agreement to restrain trade is alleged, and, therefore, the Government is compelled to contend that the natural, necessary, and inevitable effect of the merger was to restrain trade.

[213] In every prior case, except *Lowe* v. *Lawlor*, 208 U. S. 274, the combination complained of has been a combination of competitors or a combination formed to eliminate competition.

As to the character of conduct condemned by the Sherman Act see *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Joint Traffic Asso.*, 171 U. S. 505; *Anderson* v. *United States*, 171 U. S. 604.

The merger did not produce, was not designed to produce, and its natural or necessary effect was not to produce any restraint of trade, for defendants were not personally restrained; defendants' business was not restrained; shoe manufacturers were not restrained; other shoe machinery manufacturers were not restrained.

The Government's contention that the shoe manufacturer's liberty of action was restrained because the number of concerns with which he could disagree was reduced is unsound.

No greater power to restrain trade resulted from the merger, and if it could be held that any such power did result it would not naturally or inevitably restrain trade.

No such power did result. If it did, the probability that it would produce a restraint of trade is too remote. *Swift & Co.* v. *United States*, 196 U. S. 375; *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267.

If any restraint of trade could result from the merger it would be purely incidental to the accomplishment of a lawful purpose. *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721; *Anderson* v. *United States*, 171 U. S. 604; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Joint Traffic Asso.*, 171 U. S. 505.

The concentration of manufacturing at Beverly produced no restraint of trade.

The leases made by the defendants were clearly lawful [214] whether considered separately or in connection with the merger.

The general rule is that all restrictions imposed by patentees not in their very nature illegal are lawful. *Bement* v. *National Harrow Co.*, 186 U. S. 70.

Considerations of public policy not recognized in the patent law are irrelevant; the right to grant restricted licenses is given by the patent law. *Henry* v. *Dick Co.*, 224 U. S. 1.

This right, like other rights under the patent law, should be construed liberally. *Ames* v. *Howard*, 1 Sumner, 482; *Henry* v. *Dick Co.*, 224 U. S. 1.

If general considerations of public policy can be considered as relevant, the right to impose such restrictions should be favored.

The Sherman Act is not applicable to restrictions which are reasonable when considered with due regard for the patentee's lawful monopoly. *Bement* v. *National Harrow*

Co., 186 U. S. 70; *Henry* v. *Dick Co.*, 224 U. S. 1; *Standard Sanitary Co.* v. *United States*, 226 U. S. 20.

The public have no right to have an unrestrained trade in or use of patented articles. *United States* v. *American Bell Tel. Co.*, 167 U. S. 224; *Park* v. *Hartmann*, 153 Fed. Rep. 24; *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. Rep. 358; *Cilley* v. *U. S. Machinery Co.*, 152 Fed. Rep. 726.

If trade is affected by reason of such conditions or restrictions imposed by patentees, such effect is incidental to the exercise of lawful rights, and therefore is itself lawful. The patentee's compensation need not be direct, but may come from the sale or use of some other article. *Button-Fastener Case*, 77 Fed. Rep. 288; *Henry* v. *Dick Co.*, 224 U. S. 1.

Mr. Justice Holmes delivered the opinion of the court.

[215] This is a writ of error to determine whether two counts in an indictment as construed by the District Court charge offences under the Sherman Act of July 2, 1890, c. 647. 26 Stat. 209. They were held bad, on demurrer, by the District Court. 195 Fed. Rep. 578. The two counts allege substantially the same facts; the first laying them as a combination in restraint of the trade of the defendants themselves, the second as a conspiracy in restraint of the trade of others, shoe manufacturers.

The facts alleged are as follows: For the last twenty-five years practically all the shoes worn in the United States have been made by the help of machines, grouped as lasting machines, welt-sewing machines, and outsole-stitching machines, heeling machines, and metallic fastening machines, there being a large variety of machines in each group. (These machines of course are not alleged to do all the work of making finished shoes.) There is a great number of shoe factories, and because the machines are expensive and the best of them patented, the manufacturers have had to get them principally from the defendants. Before and up to February 7, 1899, the defendants, \
Brown, through the Consolidated and

chine Company, under letters patent, made sixty per cent of all the lasting machines made in the United States; the defendants, Barbour and Howe, through the Goodyear Shoe Machinery Company, in like manner, made eighty per cent of all the welt-sewing machines and outsole-stitching machines, and ten per cent of all the lasting machines; and the defendant Storrow (against whom the indictment has been dismissed), through the McKay Shoe Manufacturing Company, made seventy per cent of all the heeling machines and eighty per cent of all the metallic fastening machines made in the United States. The defendants all were carrying on commerce among the States with such of the [216] shoe manufacturers as are outside Massachusetts, the State where the defendants made their machines.

On February 7, 1899, the three groups of defendants above named, up to that time separate, organized the United Shoe Machinery Company and turned over to that company the stocks and business of the several corporations that they respectively controlled. The new company now makes all the machines that had been made in different places, at a single new factory at Beverly, Massachusetts, and directly, or through subsidiary companies, carries on all the commerce among the States that had been carried on independently by the constituent companies before. The defendants have ceased to sell shoe machinery to the shoe manufacturers. Instead, they only let machines, and on the condition that unless the shoe manufacturers use only machines of the kinds mentioned furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away. This condition they constantly have enforced. The defendants are alleged to have done the acts recited with intent unreasonably to extend their monopolies, rights, and control over commerce among the States; to enhance the value of the same at the expense of the public, and to discourage others from inventing and manufacturing machines for the work done by those of the defendants. The organization of the new company and the turning over of the stocks and business to it are alleged to constitute a breach of the Sherman Act.

It is to be observed that the conditions now inserted in the leases are not alleged to have been contemporaneous with the combination, or to have been contemplated when it was made. The District Court construed the indictment as confined to the combination of February 7; that is, simply to the merger of the companies without regard to the leases subsequently made, 195 Fed. Rep. 592, 594; [217] and we have no jurisdiction to review this interpretation of the indictment. *United States* v. *Patten*, 226 U. S. 525. Hence the only question before us is whether that combination taken by itself was within the penalties of the Sherman Act. The validity of the leases or of a combination contemplating them cannot be passed upon in this case.

Thus limited the question does not require lengthy discussion, and a large part of the argument addressed to us concerned matters not open here. On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent case*, 210 U. S. 405, 429, and it may be assumed that the success of the several groups was due to their patents having been the best. As, by the interpretation of the indictment below, 195 Fed. Rep. 591, and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from seventy to eighty per cent of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendants' share in commerce among the States does not appear. But taking it as true we can see no greater objection to one corporation manufacturing seventy per cent of three non-competing groups of patented machines collec-
ised for making a single product than to three cor-
me proportion of one group each

The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. [218] It is as lawful for one corporation to make every part of a steam engine and to put the machine together as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt. See *Virtue* v. *Creamery Package Manufacturing Co.*, *ante*, p. 8; *Swift & Co.* v. *United States*, 196 U. S. 375, 396.

It was argued as an afterthought that the act of March 2, 1907, c. 2564, 34 Stat. 1246, under which the United States took this writ of error, was repealed by the Judicial Code of March 3, 1911, c. 231; 36 Stat. 1087, 1168. But it is not mentioned among the statutes expressly repealed by § 297 of the latter act, it is not superseded by any other regulations of the matter, it is a special provision, and on principles similar to those discussed in *Ex parte United States, Petitioner*, 226 U. S. 420, it must be held not to have been repealed. See further *Johnson* v. *United States*, 225 U. S. 405, 419; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497.

Judgment affirmed.

UNITED STATES OF AMERICA v. PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, PACIFIC COAST STEAMSHIP COMPANY, ALASKA STEAMSHIP COMPANY, CANADIAN PACIFIC RAILROAD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR ALASKA, DIVISION NO. 1.

No. 697. Argued February 28, 1913.—Decided April 7, 1913.

[228 U. S., 87.]

While under the Interstate Commerce Act a carrier may select its through route connections, agreements for such connections may constitute violations of the Anti-Trust Act if made not from natural trade reasons or on account of efficiency, but as a combination and conspiracy in restraint of interstate trade and for the pur-

Syllabus.

pose of obtaining a monopoly of traffic by refusing to establish routes with independent connecting carriers.[a]

In reviewing the decision of the lower court sustaining a demurrer to an indictment charging a combination in violation of the Anti-Trust Act, this court is not called upon to consider what the elements of the plan may be independently, or whether there is or is not a standard of reasonableness which juries may apply. If a criminal violation of the act is charged, the criminal courts have cognizance of it with power of decision in regard thereto.

A combination made in the United States between carriers to monopolize certain transportation partly within and partly without the United States is within the prohibition of the Anti-Trust Act, and [88] also within the jurisdiction of the criminal and civil law of the United States, even if one of the parties combining be a foreign corporation.

While the United States may not control foreign citizens operating in foreign territory, it may control them when operating in the United States in the same manner as it may control citizens of this country.

The purpose of the Interstate Commerce Act is to establish a tribunal to determine the relation of communities, shippers, and carriers, and their respective rights and obligations dependent upon the act, and the conduct of carriers is not subject to judicial review in criminal or civil cases based on alleged violations of the act until submitted to and passed on by the commission.

Quære, what the effect is of a finding by the Interstate Commerce Commission in such a case.

Where the District Court holds that the averments of the indictment are not sufficient to connect certain defendants with the offense charged, it construes the indictment and not the statute on which it is based, and this court has no jurisdiction under the Criminal Appeals Act to review the decision.

An objection to the demurrer made by certain defendants and sustained as to one count, and not passed on as to other counts which were struck down by the District Court but sustained by this court, may be raised in the District Court by such defendants in regard to such counts when the case is again before that court.

[57 L. Ed. 742.[b]]

MONOPOLY—UNDER ANTI-TRUST ACT—THROUGH-ROUTE AGREEMENTS.—1. An agreement between connecting railway and steamship carriers and a wharfage company to establish a through route and

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Statement of the Case.

joint rates for transportation between Puget Sound and Yukon River points, to refuse to make such arrangements with other connecting carriers, and to charge high local rates and discriminating wharfage charges—all with the intent and result of eliminating all competition — violates the prohibitions of the Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), against combinations or conspiracies in restraint of interstate or foreign trade or commerce, or the monopolization of, or attempt to monopolize, any part of such trade or commerce.

For other cases, see Monopoly, II., in Digest Sup. Ct. 1908.

MONOPOLY—ANTI-TRUST ACT—EXTRA-TERRITORIAL EFFECT.—2. Extra-territorial effect is not given to the provisions of the Anti-Trust Act of July 2, 1890, by construing it to forbid a combination of foreign and domestic corporations to restrain competition in, and to monopolize, the transportation of freight and passengers between Puget Sound and Yukon River points over a route which lies in part outside the United States.

Construction of Anti-Trust Act, see Monopoly, in Digest Sup. Ct. 1908.

CARRIERS—REMEDY FOR DISCRIMINATION—NECESSITY OF ACTION BY INTERSTATE COMMERCE COMMISSION.—3. Discriminations practised by carriers in the giving or refusing of joint traffic arrangements contrary to the act to regulate commerce cannot be redressed by the courts in either a criminal or civil proceeding in advance of action by the Interstate Commerce Commission.

For other cases, see Carriers, III, in Digest Sup. Ct. 1908.

APPEAL—BY GOVERNMENT IN CRIMINAL CASE—CONSTRUCTION OF INDICTMENT.—4. A decision of a Federal district court on demurrer, that the averments of an indictment charging violations of the Anti-Trust Act of July 2, 1890, were not sufficient to connect the individual defendants with the offense charged, is a construction of the indictment, and may not be reviewed in the Federal Supreme Court at the instance of the Government.

For other cases, see Appeal and Error, I e, in Digest Sup. Ct. 1908.

APPEAL—JUDGMENT—REMANDING—DIRECTIONS TO LOWER COURT.—5. The Federal Supreme Court, when reversing a judgment of a Federal district court, sustaining demurrers to an indictment charging violations of the Anti-Trust Act of July 2, 1890, which is based upon the construction of that act, will leave it open to that court to pass upon such of the grounds of demurrer as were not considered in the former ruling—especially where the Government does not express great confidence in the sufficiency of the indictment.

For other cases, see Appeal and Error, IX 1, in Digest Sup. Ct. 1908.

Indictment for alleged violations of the Sherman Anti-Trust Act and of the Interstate Commerce Act.

Statement of the Case.

The indictment contains six counts. The first and second counts charge violations of the Anti-Trust Law. The first by the defendants engaging in a combination and conspiracy in restraint of trade and commerce with one another to eliminate and destroy competition in the business of transportation in freight and passengers between various ports in the United States and British Columbia in the south, and the various cities in the valleys of the Yukon River and its tributaries, both in British and American territory, in the north, upon a line of traffic described, for the purpose and with the intention of monopolizing such trade and commerce. The second count charges the monopolization of trade and commerce in the [89] same business and between the same ports. The manner of executing the alleged criminal purpose is charged to be the same in both counts.

The places of the incorporation of the corporate defendants are alleged, and the following facts: The Pacific Coast Steamship Company and the Alaska Steamship Company operate, respectively, lines of steamships as common carriers of freight and passengers running in regular route between Seattle, State of Washington, and Skagway, Alaska. The Canadian Pacific Railway Company is a like carrier and operates a line of steamships between Vancouver, British Columbia, and Skagway. During the time mentioned in the indictment the Pacific & Arctic Railway & Navigation Company owned and operated a railroad from tidewater at Skagway to the summit of White Pass, a distance of about twenty miles to the boundary line between Alaska and British Columbia, at which latter point it connected with a railroad owned and operated by the British Columbia Yukon Railway Company. The latter road extended from the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and Yukon District of Canada, a distance of about twenty-five miles, at which point it connected with another railroad, owned and operated by the British Yukon Railway Company, which extends to White Horse on the headwaters of the Yukon River, in Yukon District of Canada. During all the times mentioned there was a line of steamers plying upon the

Statement of the Case.

Yukon River and the headwaters thereof between White Horse and Dawson, owned and operated by the British Yukon Navigation Company. The four corporations last above mentioned and their stocks and bonds were owned and controlled by the same persons and individuals, and the said three lines of railroads and their lines of steamers were under one and the same management and were operated as one continuous line [90] of common carriers of freight and passengers between the towns of Skagway and Dawson and way points under the name and style of the White Pass and Yukon Route, referred to as "the railroad" and had the sole and exclusive monopoly of the transportation business between Lynn Canal and the navigable waters of the Yukon River. A general trade and commerce was carried on between British Columbia and Puget Sound ports and the Yukon Valley, both in American and British territory, over the designated routes and to the various places on the routes, and the shortest and most natural route for such trade and commerce was, has been, and is by water craft from said southern ports to Skagway, and thence over Moore's Wharf, so called, to the points of destination. Trade and commerce from White Horse and Dawson to said southern ports would naturally, when left untrammeled by unlawful interference, move up the Yukon to the headwaters of that river and thence by way of said railroad to Skagway, Alaska, thence over said Moore's Wharf, and thence by steamship or other water craft to the said southern ports.

The North Pacific Wharves & Trading Company was the owner and in exclusive possession and control of all of the wharves at Skagway at which steamships or other water crafts could take and discharge, or load cargo, that company having a complete and absolute monopoly of the wharfage business at Skagway, and owning and operating the Moore Wharf, which wharf, by agreement between the Wharves Company and the railroad, had been made and was the terminus of the railroad over which all freight going to or coming from or passing through Skagway had necessarily to pass. The wharf was operated as a public wharf.

boldt" on a regular schedule and route between Seattle, Washington, and Skagway. "The railroad," as we have seen the White Pass & Yukon route is called in all of the counts, had entered into and maintained during the time aforesaid with the defendant steamship companies a joint traffic arrangement whereby and under the terms of which freight and passengers might be billed at a joint through rate from the said southern ports over the route described to the various Yukon points, but refused without cause or excuse to enter into a joint traffic arrangement with the Humboldt Company, though requested to do so, or to receive, carry, or handle any freight billed through from Seattle to Yukon points on the railroad or the Yukon River; and neither would nor did carry any freight whatever from Skagway to any of said points in British or American territory at a less rate or charge than from 5 per cent to 30 per cent more, according to classification and character, than it received from the defendant steamship companies as its proportion of joint through rates from such southern points to the corresponding Yukon points. The railroad company, it is charged, caused the North Pacific Wharves & Trading Company to charge for all freight shipped on the steamship "Humboldt" for transshipment on the railroad to points along its line on the Yukon River a wharfage of $2 per ton, whereas it included at the same time in its portion of the through rate on through bills under its arrangement with defendant steamship companies all wharfage charges. And it is alleged that the defendants knowingly, willfully, and maliciously induced and incited the railroad company to practice the discrimination described, and each and all aided and abetted one another and the railroad company in such practice.

[94] The other facts as to routes, commerce and carriers, their relations and arrangements and the effect of them are the same as in the first and second counts, the order of statement being somewhat different.

Count 4 is the same, as to the facts alleged, as the third count except the discrimination is charged to have been practiced against the Humboldt Steamship Company between August 18, 1910, and January 1, 1912.

Count 5 brings the discrimination charged down to the finding and presentation of the indictment. There is no allegation of discrimination in wharfage charges.

Count 6 charges the crime of conspiracy to commit an offense against the United States by destroying competition between the defendant steamship companies and the Humboldt Steamship Company. The same facts are alleged as in the other counts.

Motions to quash the indictment and each of its counts were made and denied. Demurrers to the indictment were filed and sustained to all counts but the sixth. To that, the demurrer of the individual defendants was sustained.

Mr. Solicitor General Bullitt for the United States:

The United States may indict for violations of the Sherman Anti-Trust Act without the necessity of any prior action by the Interstate Commerce Commission on the facts involved.

An act may be in violation of the Sherman Anti-Trust Law without being in violation of the Interstate Commerce Act. *Meeker* v. *Lehigh Valley R. R. Co.*, 183 Fed. Rep. 548; *Texas R. R. Comm'n* v. *A., T. & S. F. Ry. Co.*, 20 I. C. C. Rep. 463, 465; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *United States* v. *Trans-Missouri Ass'n*, 166 U. S. 290.

The Interstate Commerce Commission has nothing to do with prosecutions under the Anti-Trust Act.

The United States may indict for unjust discriminations, [95] &c., in violation of the Interstate Commerce Act without the necessity of first having the Interstate Commerce Commission determine the legality or propriety of the acts complained of.

The Interstate Commerce Commission has powers as between carriers and shippers, but not as between the United States and carriers or shippers.

Different rules govern applications by shippers for relief in the courts from those governing the United States. (*a*) In the light of reason. (*b*) The provisions of the statute. (*c*) Under the authorities.

For suits between private parties see *Atlantic Coast Line* v. *Macon Grocery Co.*, 166 Fed. Rep. 206; *B. & O. R. R. Co.*

Argument for Defendants.

v. *Pitcairn Coal Co.*, 215 U. S. 481; *Columbus Iron Co.* v. *Kanawha Ry. Co.*, 171 Fed. Rep. 713; *Houston Coal Co.* v. *N. & W. Ry. Co.*, 171 Fed. Rep. 723; *Jewett Bros.* v. *C., M. & St. P. Ry. Co.*, 156 Fed. Rep. 160; *Kiser Co.* v. *Central of Ga. Ry. Co.*, 158 Fed. Rep. 193; *No. Pac. Ry. Co.* v. *Pacific Coast &c. Ass'n*, 165 Fed. Rep. 1; *Proctor & Gamble* v. *United States*, 225 U. S. 282; *Robinson* v. *B. & O. R. Co.*, 222 U. S. 506; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Union Pacific R. R. Co.* v. *Oregon & Wash. Ass'n*, 165 Fed. Rep. 13; *Wickwire Steel Co.* v. *N. Y. C. & H. R. R. Co.*, 181 Fed. Rep. 316.

As to prosecutions by the United States, see *Armour Packing Co.* v. *United States*, 209 U. S. 56; *A., T. & S. F. Ry. Co.* v. *United States*, 170 Fed. Rep. 250; *Chicago & Alton Ry. Co.* v. *United States*, 156 Fed. Rep. 558; *S. C.*, 212 U. S. 563; *Chicago, St. P. &c. Ry. Co.* v. *United States*, 162 Fed. Rep. 835; *C., B. & Q. Ry. Co.* v. *United States*, 209 U. S. 90; *Great Nor. Ry. Co.* v. *United States*, 208 U. S. 452; *L. V. R. R. Co.* v. *United States*, 188 Fed. Rep. 879; *N. Y. Central* v. *United States*, 212 U. S. 481, 500; *Standard Oil Co.* v. *United States*, 179 Fed. Rep. 614; *United States* v. *B. & O. R. R. Co.*, 153 Fed. Rep. 997; *United* [96] *States* v. *Great Nor. R. Co.*, 157 Fed. Rep. 288; *United States* v. *Hocking Valley Ry. Co.*, 194 Fed. Rep. 234; *United States* v. *Mer. & Min. &c. Co.*, 187 Fed. Rep. 363; *United States* v. *Miller*, 223 U. S. 599; *United States* v. *P. & R. Ry. Co.*, 184 Fed. Rep. 543; *United States* v. *Sunday Creek Co.*, 194 Fed. Rep. 252; *United States* v. *Texas & Pac.*, 185 Fed. Rep. 820; *Wight* v. *United States*, 167 U. S. 512; *Wisconsin Cent.* v. *United States*, 169 Fed. Rep. 76.

Mr. W. H. Bogle, with whom *Mr. Carrol B. Graves*, *Mr. W. B. Stratton*, *Mr. Ira Bronson*, *Mr. Morven Thompson* and *Mr. Bruce C. Shorts* were on the brief, for defendants in err[illegible]

Under [illegible] of the act of March 2, 1907, the question[illegible] only those [illegible] from the decision [illegible] in constr[illegible] upon which [illegible] founded.

Holding that the indictment did not sufficiently specify the acts of the individual defendants which were relied upon as constituting a participation by them in the offense charged, or in aiding or assisting therein is not a construction of either the conspiracy statute, upon which that count of the indictment was founded, or of the Interstate Commerce Act, the violation of which was the crime which the defendants were alleged to have conspired to commit. The ruling of the court below sustaining the demurrer as to count 6 was based upon general principles of criminal pleading, and is not reviewable under this writ. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Stevenson*, 215 U. S. 190.

Neither of the acts charged in the indictment, nor the two combined, amounts to undue restraint of trade or monopoly under the Anti-Trust Act, or undue discrimination under the Interstate Commerce Act.

The Pacific and Arctic Railway & Navigation Com-[97]pany was constructed and operated from the international boundary line to Skagway. It was under no legal duty to assume any obligations whatever with respect of the carriage of either freight or passengers by water between Skagway and the southern ports. If it voluntarily assumed any obligations for carriage beyond its own line, it had the legal right at its own discretion to select the agencies beyond its own line for which it would be responsible. Under the principles of common law it had this absolute right. and could enter into an agreement for through routing and through rating with one connecting carrier and refuse to enter into any such agreement with any other connecting carrier. *A., T. & S. F. R. Co.* v. *D. &c. Co.*, 110 U. S. 667; *S. P. R. Co.* v. *I. Com. Comm.*, 200 U. S. 536; *Interstate Com. Comm.*, v. *N. P. Co.*, 216 U. S. 538; *St. Louis Drayage Co.* v. *L. & N. R. R.*, 65 Fed. Rep. 39; *O. S. L. Co.* v. *N. P. R. Co.*, 51 Fed. Rep. 465; *C. & N. W. Co.* v. *Osborne*, 52 Fed. Rep. 912; *P. & S. Co.* v. *A., T. & S. F. Co.*, 73 Fed. Rep. 438; *G., C. & S. R. Co.* v. *S. S. Co.*, 86 Fed. Rep. 407; *Central Stock Yards Co.* v. *L. & N. R. Co.*, 118 Fed. Rep. 113.

The provision in § 1 of the Commerce Act, requiring carriers to establish through routes and just and reasonable

rates applicable thereto, does not require a carrier to establish through routes with all connecting carriers. So long as reasonable through routes are established the obligation imposed is complied with.

This clause in § 1 standing alone, is not capable of particular enforcement, and it must be read in connection with § 15. Two carriers cannot establish a through route unless they can agree upon the terms and conditions and upon the amount and division of the through rate. The failure of carriers to come to terms of agreement cannot be made a criminal offense under § 10 of the Commerce Act or under the Sherman Act. *Cardiff Coal Co.* v. *C., M. & St. P. R. Co.*, 13 I. C. C. Rep. 460. There [98] was no legal duty upon the carrier to make a through routing agreement with any particular connecting carrier, until the Interstate Commerce Commission, after a hearing, had, in the first instance, determined that such a through route was required by the public interest and ordered its establishment. *Interstate Com. Comm.* v. *N. P. C.*, 216 U. S. 538.

The indictment in this case does not allege that any particular agreement for through routing was ever presented to the railway company by any other connecting carrier than the defendants, nor does it allege upon what terms and conditions the railway should have contracted, nor indicate in any way how the defendant railway company was to be protected against the additional obligations resulting from a through routing with such carrier.

It is intended by the Interstate Commerce Act that the question, when and under what circumstances a through route should be established between any two particular connecting carriers (in the absence of voluntary agreement between them), and upon what terms and conditions such through route should be established, was committed in the first instance exclusively to the determination of the Interstate Commerce Commission pursuant to the provisions of § 15 of the act: that the courts could not, in either a civil or criminal prosecution [illegible] determine in the first instance and in the absence [illegible] the Commission, whether a through route [illegible] two specified connecting carriers was or [illegible] the public interest: and that

in the absence of any action by the Commission, an allegation that a carrier entered into a through routing agreement with one connecting carrier and refused to make such agreement with any other carrier, cannot be held to be undue discrimination under the Commerce Act, or undue restraint of trade under the Anti-Trust Act. *Tex. & Pac. Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. Co.* v. [99] *Pitcairn Coal Co.*, 215 U. S. 482; *Robinson* v. *B. & O. R. Co.*, 222 U. S. 506; *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282.

The establishment or non-establishment of a through route in a given instance is administrative in its nature, and the determination of the necessity for its establishment is, in the first instance, committed exclusively to the judgment of the Commission by § 15 of the act.

The construction of the indictment by the court below, showing a difference in conditions under which different wharfage rates were charged, is binding upon this court. *United States* v. *Biggs*, 211 U. S. 507; *United States* v. *Patten*, 226 U. S. 525; *United States* v. *Winslow*, 227 U. S. 202.

The reasonableness of the wharfage rate on local shipments, and the reasonableness of the difference in the rate on local and on through-routed shipments, are questions for the solution of which there is no certain or fixed standard, and upon which different men might reasonably reach different conclusions. To make criminality depend, not upon facts, but upon the view of a jury as to the reasonableness of rates is contrary to fundamental principles. *Tozier* v. *United States*, 52 Fed. Rep. 917; *Van Patten* v. *C., M. & St. P. Ry. Co.*, 81 Fed. Rep. 545.

While it is alleged that the lines from Skagway to Dawson were under one and the same management and operated as one continuous line, it is not alleged that the defendant railroad company or any of the other defendants had any interest in or control over or participated in the operation of either of the three foreign lines.

The laws of the United States cannot make it either criminal or wrongful for the owners of a foreign railroad

to refuse to enter into traffic agreements with any other carrier, whether located within or without the United States, and involving a carriage in such foreign country. It is not and cannot be criminal or wrongful for the [100] defendant railway company or its officers to refuse to extend through-routing privileges over railroads and steamship lines owned and operated by other corporations in a foreign country. Neither the defendants nor the Interstate Commerce Commission itself had any power to establish through-routing and through-rating over these foreign lines without the consent of the owners and operators of such foreign lines. Our laws cannot be extended so as to control or affect foreign carriage. *Am. Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

The acts charged against the defendants were lawful at common law, and are not forbidden by the Interstate Commerce Act; it cannot, therefore, be held that they constitute either undue restraint of trade or undue discrimination. The refusal by the railroad company to give to the Humbolt Steamship Company, or any other company, privileges which it was under no legal obligation to give, and to which such other company was not legally entitled, cannot be made the basis of a charge of either undue discrimination or undue restraint of trade. *A. J. & F. S.* v. *Tiedt*, 196 Fed. Rep. 349; *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; *Gamble-Robinson Co.* v. *Railroad*, 168 Fed. Rep. 161; *G., C. & S. R. Co.* v. *Miami Steamship Co.*, 86 Fed. Rep. 407.

With respect to counts 1 and 2, the allegations of the indictment are too general and indefinite.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

The District Court said that it was "without jurisdiction to entertain or determine the questions involved in the first five counts of the indictment in either a criminal or civil proceeding," until the matters of discrimination between carriers or shippers or the giving or refusing of joint traffic arrangements "have been submitted to [illegible]
on by the Interstate Commerce Co[illegible]
clusion the court relied on [illegible]

lene Cotton Oil Co., 204 U. S. 427, and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 492.

It may be well, even at the expense of repetition, to give a summary of the indictment before passing to the special contention of the parties. The route described is between ports of the United States (called southern ports) and places in northern Alaska and Canada (called northern ports)—(1) by steamship lines from the United States and Vancouver (southern ports) to Skagway (the entire wharfage facilities being owned by The North Pacific Wharves & Trading Company); (2) thence by railroad to the headwaters of the Yukon River; (3) thence by boat down the Yukon River to Dawson, etc. (called the northern ports). The route is designated as the White Pass and Yukon Route and is constituted of (*a*) The Pacific and Arctic Railway and Navigation Company, a West Virginia corporation; (*b*) The British Columbia-Yukon Railway Company, incorporated under the laws of British Columbia; (*c*) The British-Yukon Railway Company, incorporated under the laws of the Dominion of Canada; and (*d*) The British-Yukon Navigation Company, Limited, incorporated under the laws of British Columbia. These companies are referred to as "the railroad company" and own the only line of transportation between the wharf at Skagway and the Yukon River.

By mutual agreement between the defendant steamship companies, the Wharves Company and the railroad company, through routes and joint rates were established, thus making one continuous line of common carriers for freight and passengers between the United States (southern ports) and northern Alaska (northern ports).

The Humboldt Steamship Company and other independent lines plied between the United States and Skagway.

[102] By agreement between the defendants the railroad refused to make any through route or joint rates with the Humboldt Company or with any of the independent steamship lines and refused to bill freight or passengers from the United States to Yukon River points, or reversely, except by ships belonging to one of the defendant companies.

By agreement between the defendants the railroad fixed so-called local rates between Skagway and the Yukon River points, which rates were very much higher than the railroad's pro rata of the through rate.

The Wharves Company charged $2 a ton for freight if shipped on a vessel not owned by one of the defendant companies. If so shipped and consigned to one who had entered into, or was about to enter into, a contract to have all of his shipments so carried, the wharfage charge was only $1. Wharfage charges in excess of $1 are unreasonably high.

As a result of the agreement, shippers were compelled to use only the ships of the defendant steamship companies, as in that way alone could lower through rates be obtained. Competition in water transportation was destroyed between the defendant steamship companies and the independent lines, defendants obtained a monopoly of the transportation business between the United States and Alaska, and the Humboldt Company was discriminated against in the matter of through rates. These agreements between the defendant companies are alleged to be (count 1) for the purpose of eliminating competition from the business of transportation between the United States and Alaska; (second count) to monopolize such business; (counts 3, 4, and 5) to discriminate against the Humboldt Company. Count 6 we omit from consideration for the present.

The charges of the indictment may be even further concentrated and attention directed to these elements: The [103] defendant steamship lines and the Humboldt and independent lines from the United States to Skagway, the wharf at Skagway, and the railroad from Skagway to the Yukon River points. The only possibility of competition is in the water part of this route. This controlled, the entire transportation is controlled; and to this control the action of the defendants was directed, the means of control being an agreement between the defendants to throw all the trade into the hands of the defendant steamship companies by the railroad compan[illegible]
and joint rates with them

Humboldt Company or any of the independent companies. The Wharves Company gave its assent by its wharfage charges and all evasion was prevented by so fixing the local rates that their combination was greater than the through rate agreed on. It is manifest that the scheme was effective and cut out the Humboldt line and the independent lines as factors in the routes of transportation between the United States and the Yukon River points. Is the scheme illegal?

This is asserted by the Government and denied by the defendants. The court below, if we take some parts of its decision, held that the forum of that question was the Interstate Commerce Commission. But, considering the decision of the court as a whole, we think it construed the Anti-Trust Act, upon which counts 1 and 2 were based, and to those counts we shall confine our discussion for the present. This is admitted by defendants. They say that as the court held that in order to constitute restraint of trade or monopolization of trade under the Anti-Trust Act the act charged must be such as at common law constituted restraint of trade, and were unlawful, to that extent the court construed the act. And, setting forth the grounds of the ruling, counsel say that the court decided that the entering into through route agreements by a common carrier with one or more connecting carriers [104] and the refusal to make such agreements with other connecting carriers was not unlawful either at common law or by the Interstate Commerce Act, and the court held, therefore, that such act did not constitute restraint within the meaning of the Anti-Trust Act. The right of a carrier to select its connections must be admitted (we state the right as absolute, without regard to the Interstate Commerce Act, for our present purposes), and if there were nothing else in the case the conclusion of the District Court would have to be affirmed. But there is another and important element to be considered. The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of

trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines. There is a charge, therefore, of infringement of the Anti-Trust Law, of something more done than the exercise of the common-law right of selecting connections, and the scheme becomes illegal. *Swift & Co.* v. *United States*, 196 U. S. 375, 396. We do not pause to justify this conclusion, either by the general purpose of the act or by its adjudged applications. Its general purpose has been elaborately set forth in very recent cases; and particular instances of its application, pertinent to the case at bar and illustrative of it, are exhibited by *Swift & Co.* v. *United States*, *supra*, and *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20. In those cases, as here, rights were brought forward to justify a purpose which transcended the limits put upon their exercise by the Anti-Trust Act. In those cases, as here, the purpose (the **[105]** means being different) was the prevention or destruction of competition, and the agreements here are exactly adapted to the purpose. Not the railroad only but the Wharves Company as well is charged to be in the combination. It was intermediate the railroad and the steamship lines and discriminated in its wharfage charge, it is alleged, to aid in the purpose of the combination, and, to complete and make effective the purpose, the local rates from Skagway to Yukon points were made greater than that part of the through transportation.

Whether $2 per ton (the rate charged to independent lines as against $1 per ton charged to the defendant steamship lines) was reasonable or unreasonable, or whether a through rate may be less than the sum of the local rates, we are not called upon to consider, although the court below thought the inquiry important and the defendants make it prominent in their contentions. The plan makes the parts unlawful (*Swift & Co.* v. *United States*, *supra*), whatever they may be independently of it, and whether there is or is not a standard of reasonableness w[illegible] apply is aside from the question. T

consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such. We are dealing with an indictment which charges a criminal violation of the Anti-Trust Act, and of that the criminal courts have cognizance, with power of decision upon the principle which we have expressed.

The next contention of defendants is that as part of the transportation route was outside of the United States the Anti-Trust Law does not apply. The consequences and, indeed, legal impossibility are set forth to such application, and, it is said, "make it obvious that our laws relating to *interstate* and *foreign* commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and * * * it is equally clear that |106| our laws cannot be extended so as to control or affect the foreign carriage." This is but saying that laws have no extra-territorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept. The indictment alleges that the four companies which constitute the White Pass & Yukon Route (referred to as the railroad) and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the Wharves Company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and so far is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

The ruling of the District Court, sustaining the demurrer to the first and second counts, was therefore erroneous.

The decision of the District Court upon counts 3, 4, and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. The District Court, as we have seen, decided that the con-

duct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The Government attacks the conclusion with arguments of great strength and contends that it makes the commission not only the judges of the civil relief that private shippers may be given against the carriers by the Interstate Commerce act, but gives the commission the control and practical determination of [107] the criminal provisions of the law. The argument, in effect, is that the conclusion of the District Court confounds the civil and criminal remedies of the law, the private injury and the public injury, resulting from the violation of its provisions. And who, it is asked, will initiate the criminal proceeding and by what proof will it be supported? What degree of proof is to be accorded to the finding of the commission—presumptive or conclusive? If neither, it is argued, "it would be a senseless thing to regard such a finding as a condition precedent of the United States to indict." If, it is asked further, the finding of the commission is to have either *prima facie* or conclusive effect, against whom is it to have such effect? If against a defendant, what becomes of the sixth amendment of the Constitution? The argument of the Government is cast in a series of questions which end in the final answer, as it is contended, that under the decision of the District Court the Interstate Commerce Commission "becomes practically the court of final criminal jurisdiction."

The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Inter
Act what it was intended to be and define

cited by the District Court, to-wit: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co., supra.* And it would in our judgment be an erroneous view to take that the great problems which [108] the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

The District Court sustained count 6, against the demurrer of the corporate defendants, but held its averments were not sufficient to connect the individual defendants with the offense charged. This is a construction of the indictment and not subject to review.

It is urged by the individual defendants that the objection is applicable to the other counts of the indictment and that the court would have undoubtedly so ruled but for its construction of the Anti-Trust Act, and it is also urged that in case of reversal of the court's decision upon the construction of the act it be permitted to pass upon such of the grounds of demurrer as were not passed upon in the former ruling. We yield to the request, and the more readily as the Government does not express great confidence in the sufficiency of the indictment. Its final contention is that the judgment of the District Court be reversed with instructions "to pass on the sufficiency of the indictment without regard to the action or non-action of the Interstate Commerce Commission."

The judgment is therefore reversed as to counts 1 and 2 and the case remanded, with instructions to proceed in accordance with this opinion.

Syllabus.

NASH *v.* UNITED STATES.[a]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 197. Argued March 18, 19, 1913.—Decided June 9, 1913.

[229 U. S., 373.]

In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti-Trust Act on the ground of uncertainty as to the prohibitions.[b]

The Sherman Act punishes the conspiracies at which it is aimed on the common law footing and does not make the doing of any act other than the act of conspiring a condition of liability. In this respect it differs from § 5440 and the indictment need not aver overt acts in furtherance of the conspiracy. *Brown* v. *Elliott*, 225 U. S. 392, distinguished.

This court can see no reason for reading into the Sherman Act more than it finds there.

It is not necessary for an indictment under the Sherman Act to allege **[374]** or prove that all the conspirators proceeded against are traders. *Loewe* v. *Lawlor*, 208 U. S. 274.

Where the indictment under the Sherman Act alleges numerous methods employed by the defendants to accomplish the purpose to restrain trade, it is not necessary, in order to convict, to prove every means alleged but it is error to charge that a verdict may be permitted on any one of them when some of them would not warrant a finding of conspiracy.

168 Fed. Rep. 489, reversed.

[57 L. Ed. 1232.[c]]

[CRIMINAL LAW—VAGUENESS IN PENAL STATUTE—ANTI-TRUST ACT.— 1. There is no such vagueness in the Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p.

[a] For prior opinions (172 Fed., 455), see volume 3, page 679; (186 Fed., 592), see volume 4, page 48. The opinion of the Circuit Court of Appeals affirming the conviction (186 Fed., 498), is as follows: "*Per Curiam:* A majority of the court is of the opinion that there is no error in the record. The judgment of the Circuit Court is therefore affirmed."

[c] The paragraphs following, in brackets, comprise the syllabus of the case as reported in volume 57, page 1232, Lawyers Edition, Supreme Court Reports.

Statement of the Case.

2200), as to render it inoperative on its criminal side, because only such contracts and combinations are within the act as, by reason of intent, or of the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition, or unduly obstructing the course of trade.

For other cases, see Criminal Law, I. a, in Digest Sup. Ct. 1908.

INDICTMENT—CONSPIRACY IN RESTRAINT OF TRADE—OVERT ACT.—2. No overt act need be alleged in an indictment charging a conspiracy to restrain or monopolize interstate trade or commerce, under the Anti-Trust Act of July 2, 1890, since that statute does not make the doing of any act other than the act of conspiring a condition of liability.

For other cases, see Indictment, II. e, 3, b, in Digest Sup. Ct. 1908.

MONOPOLY—UNDER ANTI-TRUST ACT—INTENT.—3. An unlawful intent may be sufficient to convert what, on their face, might be no more than ordinary acts of competition, or the small dishonesties of trade, into a conspiracy forbidden by the Anti-Trust Act of July 2, 1890, enacted to prevent combinations in restraint of interstate or foreign commerce, or the monopolization or intent to monopolize any part thereof.

For other cases, see Monopolies, II. a, in Digest Sup. Ct. 1908.

MONOPOLY—UNDER ANTI-TRUST ACT—TRADERS.—4. The alleged conspirators need not all be traders in order to bring their conspiracy within the condemnation of the Anti-Trust Act of July 2, 1890, of combinations in restraint of interstate or foreign commerce, or the monopolization or attempt to monopolize any part thereof.

For other cases, see Monopolies, II. b, in Digest Sup. Ct. 1908.

APPEAL—INSTRUCTIONS—CONSPIRACY.—5. Instructing the jury to consider all the means charged in an indictment for conspiring, contrary to the act of July 2, 1890, to restrain or monopolize interstate or foreign commerce, and to find a verdict of guilty on any one of them, without calling the jury's attention in this connection to the fact that some of the charges had been abandoned, is reversible error—especially where one of the means alleged, taken by itself, shows only cheating and could not warrant a finding of the conspiracy with which the defendants were charged.

For other cases, see Appeal and Error, VIII. m, 4, a, in Digest Sup. Ct. 1908.]

The facts, which involve the validity of a verdict and sentence for alleged violations of the Sherman Anti-Trust Act, are stated in the opinion.

Mr. Samuel B. Adams and *Mr. John C. Spooner*, with whom *Mr. George Rublee* was on the brief, for petitioners.

Mr. Assistant to The Attorney General Fowler, with whom *Mr. Alexander Akerman*, United States attorney, was on the brief, for the United States.

Mr. Justice HOLMES delivered the opinion of the court.

This is an indictment in two counts—the first for a conspiracy in restraint of trade, the second for a conspiracy to monopolize trade, contrary to the act of July 2, 1890, c. 647, 26 Stat. 209, commonly known as the Sherman Act. Originally there was a third count for monopolizing, but it was held bad on demurrer and was struck out.

The allegations of fact in the two counts are alike. Summed up in narrative form they are as follows: The American Naval Stores Company, a West Virginia corporation having its principal office in Savannah and branch offices in New York, Philadelphia, Chicago, etc., was engaged in buying, selling, shipping, and exporting spirits of turpentine in and from Southern States to other States and abroad. Nash was the president; Shotter, chairman [375] of the board of directors; Myers, vice-president; Boardman, treasurer; DeLoach, secretary; and Moller, manager, of the Jacksonville, Florida, branch. The National Transportation and Terminal Company, a New Jersey corporation, had warehouses and terminals for handling spirits of turpentine and naval stores at Fernandina and other places named in Florida, Alabama, Mississippi, etc., and was engaged in storing such turpentine and rosin and issuing warehouse receipts for the same. Myers was the president, DeLoach the secretary, and Moller manager of the Jacksonville branch. On May 1, 1907, it is alleged, these corporations and individuals conspired to restrain commerce in the articles named among the States and with foreign nations—the restraint to be effected in the following ways among others: (1) By bidding down turpentine and rosin so that competitors could sell them only at ruinous prices; (2) by causing naval stores receipts that naturally would go to one port to go to another; (3) by purchasing thereafter a large part of "its" supplies at ports kno
with intent to depress the market, ref

any appreciable part at Savannah, the primary market in the United States for naval stores, where purchases would tend to strengthen prices, the defendants taking the receipts at the closed ports named on a basis of the market at Savannah; (4) by coercing factors and brokers into contracts with the defendants for the storage and purchase of their receipts and refusing to purchase from such factors and brokers unless such contracts were entered into; (5) by circulating false statements as to naval stores production and stocks on hand; (6) by issuing fraudulent warehouse receipts; (7) by fraudulently grading, regrading, and raising grades of rosins and falsely gauging spirits of turpentine; (8) by attempting to bribe employés of competitors so as to obtain information concerning their business and stocks; (9) by inducing consumers, by payments and [376] threats of boycotts, to postpone dates of delivery of contract supplies and thus enabling defendants to postpone purchasing when to purchase would tend to strengthen the market; (10) by making tentative offers of large amounts of naval stores to depress the market, accepting contracts only for small amounts, and purchasing when the market had been depressed by the offers; (11) by selling far below cost in order to compel competitors to meet prices ruinous to everybody; (12) by fixing the price of turpentine below the cost of production—all the foregoing being for the purpose of driving competitors out of business and restraining foreign trade or, in the second count, of doing the same and monopolizing the trade.

The two counts before use were demurred to on the grounds that the statute was so vague as to be inoperative on its criminal side; that neither of the counts alleged any overt act; that the contemplated acts and things would not have constituted an offence if they had been done, and that the same acts, etc., were too vaguely charged. The demurrer was overruled and this action of the court raises the important questions of the case. We will deal with them before passing to matters of detail.

criminal operation of the statute is *The Standard Oil Co.* v. *United*

States, 221 U. S. 1, and *United States* v. *American Tobacco Co.*, 221 U. S. 106. Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. **[377]** The kindred proposition that "the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty," is cited from the late Mr. Justice Brewer sitting in the Circuit Court. *Tozer* v. *United States*, 52 Fed. Rep. 917, 919.

But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it" by common experience in the circumstances known to the actor. "The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw." *Commonwealth* v. *Pierce*, 138 Massachusetts, 165, 178. *Commonwealth* v. *Chance*, 174 Massachusetts, 245, 252. "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct." 1 East P. C. 262. If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder, however little he expected the result. See *Reg.* v. *Desmond*, and other illustrations in Step

Law, art. 223, 1st ed., p. 146. If he

negligently through a street he might get off with manslaughter or less. *Reg.* v. *Swindall*, 2 C. & K. 230; *Rex* v. *Burton*, 1 Strange, 481. And in the last case he might be held, although he himself thought that he was acting as a prudent man should. See *The Germanic*, 196 U. S. 589, 596. But without further argument, the case is very nearly disposed of by *Waters-Pierce Oil Co.* v. [378] *Texas* (No. 1), 212 U. S. 86, 109, where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.

Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. The decisions as to the relations of a subsequent overt act to crimes under Rev. Stat. § 5440, in *Hyde* v. *United States*, 225 U. S. 347, and *Brown* v. *Elliott*, 225 U. S. 392, have no bearing upon a statute that does not contain the requirement found in that section. As we can see no reason for reading into the Sherman Act more than we find there, we think it unnecessary to offer arguments against doing so.

As to the suggestion that the matters alleged to have been contemplated would not have constituted an offence if they had been done, it is enough to say that some of them conceivably might have been adequate to accomplish the result, and that the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope, as has been explained more than once. *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Loewe* v. *Lawlor*, 208 U. S. 274, 299. Of course this fact calls for conscience and circumspection in prosecuting officers, lest by the unfounded charge of a wider purpose than the acts necessarily import they convert what at most would be small local offences into crimes under the statutes of the
But we cannot say, as was the case in
nslow, 227 U. S. 202, 218, that no intent
posed conduct into such a crime.

Finally, we cannot pronounce the counts before us bad for uncertainty. On demand of the defendants a bill of [379] particulars was furnished, and there is so reason to fear that injustice was done in that respect. There was no need to allege or prove that the conspirators themselves were all traders. *Loewe* v. *Lawlor*, 208 U. S. 301. The first count, at least, was well enough.

After the demurrer was overruled the defendants pleaded not guilty and there was a trial and a verdict finding that Nash, Shotter, Myers, Moller, and Boardman were guilty and DeLoach not guilty, but saying nothing as to the corporations. Numerous exceptions were taken, but as writs of certiorari are not granted to bring up the ordinary incidents of a criminal trial we shall say little more than is necessary to dispose of the case. It was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it, and therefore that a verdict that was silent as to them ought to be set aside. We need not consider the effect of Rev. Stat., § 1036, or whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations, as the judgment must be reversed for another reason.

The reason is this. The court in its instructions told the jury to "consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy" and said: "You will consider carefully all the means which the indictment charges" and "It is sufficient if it be shown beyond a reasonable doubt that some of these means charged were a part of the common scheme, design, or understanding or conspiracy by two or more of the defendants, and that these same means were of themsel[illegible] ufficient to cause an essential obstr[illegible] and

untrammelled flow of trade and commerce between the States and foreign nations." Thus while it may be admitted that not all the means alleged need be proved, the charge invited the jury to consider all and permitted a verdict upon any one of them. The fifth, sixth, and eighth statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important. Furthermore, one of the means alleged was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic it would have had a tendency to show the scheme alleged. But taken by itself, as the jury might have taken it under the instructions, it showed only cheating and could not warrant a finding of the conspiracy with which the defendants were charged. It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged; for instance, the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point.

Judgment reversed.

Mr. Justice PITNEY dissents.

UNITED STATES v. LAKE SHORE & M. S. RY. CO. ET AL.

(District Court, S. D. Ohio, E. D. December 28, 1912.)

[203 Fed. Rep., 295.]

MONOPOLIES (§ 16)—ANTI-TRUST ACT—COMBINATION BETWEEN COAL-CARRYING RAILROADS.—Coal-carrying railroads extending into the same coal fields, although reaching different mines, or extending into different fields where competing coal is produced, which traverse generally parallel lines and reach either directly or through their connections the same markets in other States, must be regarded as natural competitors in interstate commerce, and any arbitrary methods between them or between them and the

Syllabus.

coal companies, by which such natural competition is eliminated, is in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

MONOPOLIES (§ 16)—ANTI-TRUST ACT—COMBINATION BETWEEN COAL-CARRYING RAILROADS.—The combination of a number of coal-carrying railroads, which were natural competitors, and the acquiring by them of large coal mining interests tributary to their several lines, so that both railroad and mining interests were under a single controlling power, the result being a division of the traffic and the elimination of competition as to interstate as well as domestic shipments, and a discrimination against all new and independent mines, was one in restraint of interstate commerce, and created a monopoly of a part of such commerce in violation of Sherman Anti-Trust Act of July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

[296] MONOPOLIES (§ 21)—PERSONS LIABLE—JOINDER AFTER CONSPIRACY IS FORMED.—One who learns of a conspiracy or unlawful combination after it is formed, and then joins it or knowingly aids in the execution of the scheme and shares in its profits, becomes from that time as much a co-conspirator as if he were one of those who originally designed it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. § 21.]

MONOPOLIES (§ 24)—ANTI-TRUST ACT—SUIT TO RESTRAIN VIOLATION—EVIDENCE.—In considering the legality of a contract between railroad companies claimed to be in restraint of interstate commerce, and in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), evidence to show the relations between the parties and the previous conduct of the business affected is competent.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MONOPOLIES (§ 16)—ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF AND TO MONOPOLIZE INTERSTATE COMMERCE.—The Hocking Valley Railway Company and the Toledo & Ohio Central Railway Company each owns and operates a line of road in Ohio from Toledo into the Hocking coal fields in the southeastern part of the State, and from a connection with such lines the Kanawha & Michigan Railway Company owns and operates a [illegible]

* Syllabus copyrighted, 1913, [illegible]

Statement of the Case.

the Kanawha coal fields in West Virginia. The principal freight business of all the roads is the carriage of coal mined in such fields and destined for lake ports or points farther to the north and west. About 1899 the Hocking Valley Company, through stock purchases and otherwise, acquired control of both the other roads, and also of a large number of coal companies owning land and mines tributary thereto. Five trunk lines, again, together purchased a controlling stock interest in the Hocking Valley Company, and the entire combination was practically managed and controlled by a committee appointed by them. In an action by the State against the Hocking Valley Company, which is an Ohio corporation, such combination was adjudged illegal, and the defendant was required to dispose of its controlling interest in the other roads and also in the mines. To meet this situation, a contract was entered into between two of the trunk line stockholders, viz., the Chesapeake & Ohio Railway Company, operating a line from the coast on the south side of the Ohio River to Cincinnati and a subsidiary line from there to Chicago, its main line touching that of the Kanawha & Michigan Company, and the Lake Shore & Michigan Southern Railway Company, operating a line from Buffalo, through Toledo, to Chicago, pursuant to which the Chesapeake & Ohio Company acquired the controlling interest in the Hocking Valley Company and the Lake Shore Company in the Toledo & Ohio Central Company, while the controlling interest in the Kanawha & Michigan Company and the coal companies was divided between them, the contract providing that each should have the right to use the road, and that its north-bound coal traffic should be fairly divided between the Hocking Valley Company and the Toledo & Ohio Central Company. *Held*, that such contract did not change the essential character of the previous arrangement, but was inconsistent with the established rule requiring freedom of competition in interstate commerce, and in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

[297] MONOPOLIES (§ 24)—ANTI-TRUST ACT—SUIT TO ENJOIN VIOLATIONS.—There is a clear distinction between the power to grant relief respecting the past failure to construct one of two projected parallel lines of railroad and the power to prevent the elimination of one of two parallel roads in actual existence and operation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

Denison, Circuit Judge, dissenting in part.

Suit by the United States against the Lake Southern Railway Company, the Chesa- Company, the Hocking Valley Rail-

Opinion of the Court.

way Company, the Toledo & Ohio Central Railway Company, the Kanawha & Michigan Railway Company, the Zanesville & Western Railway Company, the Sunday Creek Company, the Continental Coal Company, and the Kanawha & Hocking Coal & Coke Company. Decree for complainant.

Sherman T. McPherson, U. S. Atty., of Cincinnati, Ohio, and *O. E. Harrison*, of Columbus, Ohio, and *John L. Lott*, of Tiffin, Ohio, Special Assts. to the Atty. Gen., for the United States.

Clyde Brown, *Chas. T. Lewis*, *John H. Doyle*, and *Frank S. Lewis*, all of Toledo, Ohio, for defendants Lake Shore & M. S. Ry. Co., Toledo & O. Cent. Ry. Co., and Zanesville & W. Ry. Co.

Lawrence Maxwell, of Cincinnati, Ohio; *H. T. Wickham*, of Richmond, Va.; and *A. C. Rearick*, of New York City, for defendant Chesapeake & O. Ry. Co.

Talfourd P. Linn, of Columbus, Ohio, for defendant Kanawha & M. Ry. Co.

Lawrence Maxwell, of Cincinnati, Ohio; *James H. Hoyt*, of Cleveland, Ohio; and *John F. Wilson*, of Columbus, Ohio, for defendant Hocking Valley Ry. Co.

William O. Henderson, of Columbus, Ohio, for defendant Sunday Creek Co.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge.

This suit was brought to enjoin further performance of certain agreements alleged to have been made in pursuance of combinations and conspiracies formed and carried out in restraint of trade among the
trade in bituminous coal,

Opinion of the Court.

1890, commonly known as the Sherman Anti-Trust Act (July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); many of the acts alleged having been committed in whole and others in part within the Eastern Division of the Southern Judicial District of Ohio.

The defendants consist of six railroad companies and three coal companies, named in the margin.[1] The railroad companies are all [298] Ohio corporations, except the Chesapeake & Ohio, which was organized in Virginia, and all are engaged in transporting interstate commerce. The coal companies named were created as follows: The Sunday Creek under the laws of New Jersey, and the other two under the laws of West Virginia.

The Railroads.—It is important to understand the geographical relations of the railroads, and similarly their relations to the coal fields involved. The Lake Shore extends from Buffalo to Chicago, passing through Ohio near the southerly shore of Lake Erie to Toledo, and thence across the northerly portion of the State, and has a number of intermediate branches. A large majority of its capital stock is owned by the New York Central. The Chesapeake & Ohio extends from Old Point Comfort to Cincinnati, running generally along the south side of the Ohio River from a point east of Huntington, W. Va., to and through Kentucky to Cincinnati, and also has a number of intermediate branch lines. It owns a great majority of the stock of the Chesapeake & Ohio Railway of Indiana, and so reaches Chicago. Thus one of these east and west trunk lines passes through Ohio near its northerly boundary, and the other along the south shore of the Ohio River near the south boundary of Ohio. Two of the remaining defendant railroads are wholly within Ohio, running generally in a north and south direction, viz., the Hocking Valley from Toledo by way of Columbus, Lancaster, Logan, and Gallipolis to

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[1] The Lake Shore & Michigan Southern Railway Company, the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Kanawha ... ay Company, the Zanesville & Western Railway ... ay Creek Company, the Continental Coal Com... ocking Coal & Coke Company.

Opinion of the Court.

Pomeroy on the Ohio River (passing through Kanauga on the Ohio River opposite Point Pleasant, W. Va.), with a branch line running from Logan to Athens; and the Toledo & Ohio Central has two divisions running from Toledo, one by way of Fostoria, Bucyrus, and Thurston to Corning in Perry County, and the other by way of Findlay, Kenton, and Columbus to Thurston on the first division. The Kanawha & Michigan runs south from Corning to the Ohio River, crossing the river from Kanauga, Ohio, to Point Pleasant, W. Va., and continuing thence through Mason, Putnam, Kanawha, and Fayette Counties by way of Charleston to Gauley Bridge, in that State, using the tracks of the Hocking Valley between Hobson and Gallipolis, by way of Kanauga; and the Zanesville & Western runs east and west from Thurston through the counties of Fairfield, Perry, and Muskingum to Zanesville, Ohio, although it seems to be part of an old road which formerly continued westwardly from Thurston to Columbus, parallel with the Hocking Valley.

The Coal Fields.—The Ohio coal fields directly in question are situated in Athens, Perry, Hocking, and Muskingum Counties, and known as the Hocking Valley coal fields; and those in West Virginia are situated in the Kanawha coal district. The four railroads last named are connected with portions of these coal fields of Ohio, and the Kanawha & Michigan with the Kanawha coal fields. The principal coal mines along the Hocking Valley are located in Athens, Perry, and Hocking counties, those along the Toledo & Ohio Central are in Fairfield, Perry, Hocking, Athens, and Muskingum, those along the Zanesville & Western are in Muskingum and Perry counties, and those along the Kanawha & Michigan are in Putnam, Kanawha, and Fayette coun-[299]ties, W. Va., besides some that are located in Perry and Athens counties, Ohio; and the principal part of the freight traffic of all the defendant railroad companies, except the Lake Shore, is bituminous coal in car load shipments, the principal mines along the Chesapeake & Ohio being in Kanawha, New River, and Big Sandy districts of West Virginia and Kentucky. A large part of the freight traffic [illegible] Shore is bituminous coal in car load ship-

ments derived from branch roads tapping the Appalachian coal fields. The coal of the various fields mentioned is shipped on these roads from the portions of coal fields with which they are severally connected as before pointed out, to lake ports and to points in the North and Northwest.

[1] *Competitive Conditions.*—The Hocking Valley and the Toledo & Ohio Central, when the latter and the Kanawha & Michigan are operated as they were for a long time as a through line, are naturally competing roads. However, evidence was offered to show that the river division of the Hocking Valley, running from Logan to Kanauga (and thence to Pomeroy, as stated), cannot be treated as a competitor of the Kanawha & Michigan, because of difficult grades on such river division. The Hocking Valley, as far south as Athens, and the Toledo & Ohio Central are naturally competing roads. It is to be noted, however, that claim is made that competing relations cannot be ascribed to roads connected as these all seem to be with different sets of coal mines, even where such mines are located in the same coal field. As it seems to us, a broader view than this must be taken. The destinations of the coal shipped from these coal fields and the effect on the prices to be exacted of the coal purchasing and consuming public located at points beyond the lake ports and the boundaries of Ohio must be taken into consideration, and not merely the producers of coal and the carriers transporting it. Manifestly it can make no difference to the coal purchaser or consumer whether coals of the same quality be derived from one particular mine or another of the same field, no matter how close together or how far removed from one another such mines may be, so long as the prices of the coals and the freight charges to be paid are influenced by natural competitive conditions both at the mines and in transportation; and the right to have such conditions maintained cannot be validly abridged through arbitrary or unusual methods. This is equally plain respecting coals of different qualities originating in different fields and requiring varying distances of transportation over lines naturally competing in material parts, for the purchaser or

Opinion of the Court.

consumer will obviously select the coal according to his particular needs or ability to sell or to pay.

It must follow that mere differences in locations of coal mines within the same general field, as well as differences in quality owing to differences in fields, cannot rightfully be made the basis for eliminating effective competition as between railroads traversing substantially the same territory along parallel lines from neighboring mines of the same coal field, or even of different coal fields, to the same general destinations; and the evil effects upon competition concerning railroads and coal mines so related are accentuated wherever a union of interests is created and maintained between such producers and car[300]riers of coal, particularly where producers and carriers through artificial methods become practically one and the same. If these views are at all applicable to a case such as this, the Kanawha & Michigan, when employed as a carrier exclusively in connection with either the Toledo & Ohio Central or the Hocking Valley, may, we think, be safely treated as a natural competitor of the one or the other of such roads, according as the connection may exist; because the destinations of its coal in either event are, in any rational competitive sense, the same as those of the other road respecting the coal originating on its line. It results (1) that traffic originating on either the Hocking Valley or the Toledo & Ohio Central should be accorded the benefits of free competition; (2) that when coal originating on the line of the Kanawha & Michigan is carried in part over both of these other roads to destinations beyond Ohio, as also coal originating on that road in West Virginia and destined to common points within Ohio, it is to the interest of the Kanawha & Michigan actually to employ the legitimate advantages arising from its opportunity to forward such coal (and this forms the great bulk of its traffic) over either of the other roads. The issue in a general sense is whether these competitive conditions have been suppressed; and the situation is further complicated by uniting coal interests with the railroad interests proper.

Opinion of the Court.

[2] *Combination and Conspiracy—Alleged Origin and Continuation.*—The combination and conspiracy averred originated in 1899 and have been continued in one form or another ever since. What happened between that time and the year 1909 resulted in a suit in quo warranto by the State of Ohio against the Hocking Valley. *State ex rel.* v. *Railway*, 12 Ohio Cir. Ct. R. (N. S.) 49, 145. The first decision in that case was rendered April 24, 1909, and upon rehearing adhered to July 21st of that year; and on January 18, 1910, the court made a finding of facts, with separate conclusions of law thereon (set out in the present record), in terms ousting the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan, the Buckeye Coal & Railroad Company, the Sunday Creek Coal Company, the Sunday Creek Company, and the Continental Coal Company; from the power of guaranteeing bonds of the Continental Coal Company; from exercising control or management of the Kanawha & Michigan, the Toledo & Ohio Central, the Zanesville & Western, and the coal companies before mentioned; and from performing a certain contract between it, the Toledo & Ohio Central, and the Continental Coal Company for division of freight between such railroads. It was adjudged, also, that the road of the Toledo & Ohio Central for its entire length is parallel to and competitive with the road of the Hocking Valley from Toledo to Logan; that the roads of the Hocking Valley and the Kanawha & Michigan are parallel lines between Logan and Corning respectively and the Ohio River; and that the Kanawha & Michigan and Toledo & Ohio Central together are competitive with the entire line of the Hocking Valley. This judgment was allowed to become final.

In March following the Lake Shore and the Chesapeake & Ohio entered into an agreement (sometimes referred to by the parties as the [301] Schaff-Stevens agreement and sometimes as the agreement of March 12th, and again of March 17th), which has become the subject of a controlling [illegible] in the present cause. Indeed, the Government's posi- [illegible] that the operation and effect of this agreement, with [illegible] been done under it, have been to continue the

scheme so condemned by the judgment of the Ohio Circuit Court; while that of the defendants is that the agreement is valid, and that the acts of the parties thereto and of all the other defendants, since the date of the agreement, have in no wise been repugnant to any Federal statute. It is not claimed that the issues determined in the State quo warranto suit are decisive of issues concerning interstate commerce; but it is urged that, apart from the State case, interpretation of the March agreement and of the conduct of the parties to it and those directly affected by it is distinctly aided by looking into the conduct of those who were interested in the properties before the agreement. Stated otherwise, the contention is that a view of the situation existing before the agreement and of the situation that has since existed cannot but be helpful to a proper solution of the controversy.

We do not propose to recite or discuss all the details of either situation, for such a course would occupy far too much space, and, moreover, is not necessary. If the locations and connections of the railroads and their relations to the coal properties are recalled, as before pointed out, it will not be difficult to apply the controlling features of the evidence adduced on the one side to prove, and on the other to disprove, the alleged combination and conspiracy and continuation thereof. In 1899 a plan for the reorganization of the Columbus, Hocking Valley & Toledo Railway Company (predecessor of the Hocking Valley) was entered into under date of January 4th, and direction of J. P. Morgan & Co. After judicial sale of the railroad property of the company, the purchasing trustees at such sale conveyed this property to the Hocking Valley, and the title thereto is still in that company. It was part of this plan to have the Hocking Valley acquire interests in the Toledo & Ohio Central and the Columbus, Sandusky & Hocking Railroad Companies, or successor companies, and in February, 1899, the stockholders of the Hocking Valley adopted a regulation reserving 50,000 shares of its preferred and 50,000 shares of its common stock for the purpose of acquiring such interests. These reserved shares

time to time listed on the New York Exchange at the instance of the Hocking Valley and for the express purpose of acquiring such interests. The purchases of the stock in the Toledo & Ohio Central were made in the name of a New Jersey corporation, called the Middle States Construction Company, which was organized in February, 1899, for that purpose. In 1899 and 1900 the Hocking Valley, through the issue of over $8,000,000 of its reserved preferred and common stock, purchased the bonded indebtedness of this construction company; and this indebtedness was secured by and convertible into the stock of the Toledo & Ohio Central, under a deed of trust of the Construction Company to the Central Trust Company of New York. Through the issue of the remainder of its reserved stock, the Hocking Valley, in 1902, purchased all the stock in **[302]** and all the bonds of the Zanesville & Western, which through judicial sale had acquired the portion of the Columbus, Sandusky & Hocking Railroad extending from Thurston, in Fairfield County, to Zanesville, in Muskingum County, with certain branch lines. It is not definitely shown when and in what amounts the purchases of the stock in the Toledo & Ohio Central were made; but it appears by stipulation that the Construction Company, in the years 1899 and 1900, acquired 58,921 shares of such stock, and the listing papers before mentioned show that the total issue of stock of the Toledo & Ohio Central was 102,080 shares, preferred and common. Moreover, from 1902 to 1909 the president and general manager of the Hocking Valley, not to speak of other officers selected later, occupied corresponding positions in the Toledo & Ohio Central and the Zanesville & Western. The control thus signified in the Hocking Valley carried with it also the control of the Kanawha & Michigan. In 1890 the Toledo & Ohio Central acquired 45,000 shares, and in 1899 an additional 100 shares of the capital stock of the Kanawha & Michigan, constituting a majority of that company's outstanding capital stock, and these two roads were operated practically as a through line; and, further, as early as February, 1891, the former guaranteed the 100-bonds of the latter at the rate of $10,000 a mile for

Opinion of the Court.

134 miles, or $1,340,000, and thereafter advanced it moneys from time to time. Further, in 1903, the Hocking Valley exchanged its holdings of stock and bonds in the Zanesville & Western for the shares held by the Toledo & Ohio Central in the Kanawha & Michigan. Thus the Hocking Valley attained practical control of the two parallel systems of railroad between Toledo and the Ohio River, including the Zanesville & Western; and, apart from influence exerted by certain trunk lines alluded to later, the Hocking Valley alone remained in control of this entire system of railroads until the execution of the agreement of March 12, 1910.

We shall gain a better knowledge of the situation as it existed prior to the March agreement, if at this point we look further into the coal fields, which were tributary to this system of roads and especially into certain portions of such fields that were under the practical control of the Hocking Valley. Much evidence was offered upon this subject, and some of it is clarified by admissions contained in some of the pleadings. By several methods the Hocking Valley procured control of large coal properties both in the Hocking and Kanawha fields. Pursuant to the plan of reorganization of 1899, that company and the Buckeye Coal & Railway Company were incorporated under the laws of Ohio, February 25, 1899, and thereafter they joined in the execution of a mortgage under date of March 1st following, providing for the issue of first-mortgage bonds in the sum of $20,000,000, and secured by the properties acquired by such companies. This coal company was organized for the purpose of acquiring the coal properties of the Hocking Coal & Railroad Company, and these properties were bid in and conveyed to the Buckeye Coal & Railway Company by the purchasing trustees at the judicial sale; and such trustees received from the new coal company 2,495 shares of its total capital stock of 2,500 shares, and thereupon entered into a traffic agreement with the Hock[303]ing Valley to secure rail connections between coal mines and the main railroad line and also coal transportation, and the trustees at the same time turned over the stock in the coal com
Hocking Valley. Out of the sales proceeds

gage bonds mentioned the Hocking Valley acquired the stock and properties of the Ohio Land & Railway and the New York & Western Coal Companies, which had belonged to and been controlled by the Columbus, Hocking Valley & Toledo Railway Company; also all the stock in the Boston Coal, Dock & Wharf Company and the Rabould Coal Company; also a majority of the preferred and likewise of the common stock of the Sunday Creek Coal Company, and afterwards the Hocking Valley increased its holdings in that company to 12,963 shares of preferred and 19,400 shares of common out of a total issue of 15,000 shares of preferred and 22,500 of common.

A different method was adopted for securing control of the Kanawha & Hocking Coal & Coke and the Continental Coal Companies, as also quite a number of other coal properties to which we shall refer in a moment. The Toledo & Ohio Central and the Hocking Valley entered into a contract to guarantee first-mortgage bonds of the coal companies last named, the details of which are not essential to an understanding of the case. It suffices to state that agreements were made under which syndicates were formed to underwrite bonds of the companies ($3,250,000 par value in all of the first company and $3,023,000 par value in all of the second company); the Toledo & Ohio Central and the Hocking Valley guaranteeing payment of such bonds, but the Hocking Valley assuming the entire obligation as between it and the other guarantor company. In connection with these guaranties the coal companies agreed to deliver all their coal to the Kanawha & Michigan for transportation, and by further agreement such coal was to be equally divided between the Hocking Valley and the Toledo & Ohio Central and so carried northwardly and beyond the Ohio terminus of the Kanawha & Michigan, and the Kanawha & Michigan agreed to purchase all its fuel coal from the coal companies at a price at least 20 cents per ton above production cost. The stock of these two coal companies and certain beneficial certificates of the ompany were issued to J. P. Morgan & Co. to secure of these contracts of guaranty. The bonds

Opinion of the Court.

so guaranteed were sold and large portions of the proceeds were used to purchase coal properties of 28 owners (consisting mostly of companies) at prices varying from $8,875 to $541,125 and aggregating $5,191,940.04. The remainder, after paying organization expenses, was placed in the treasuries of the coal companies. Further, the Toledo & Ohio Central owned the entire capital stock of the Imperial Coal Company and also the National Coal Company, the former being $300,000 and the latter $160,000 par value.

We are unable to discover from the evidence the acreage of these coal lands or their precise locations. An estimate made by the vice president of the Sunday Creek Company, of its unmined coal acreage on December 31, 1910, showed that there were 42,710 acres in Athens, Perry, and Hocking Counties of Ohio and 33,000 in Kanawha and Fayette Counties of West Virginia. But in July, 1905, the Sunday [304] Creek Company (not the Sunday Creek Coal Company, another subsidiary company of the Hocking Valley) was organized under the laws of New Jersey with an authorized capital stock of $4,000,000 for the purpose of engaging in business in the State of Ohio and owning and developing lands containing coal and other minerals. It is averred in the bill that the Sunday Creek Company controls more than 100,000 acres of land, including about 50 mines and about 350 coke ovens, and owns the beneficial certificates of the Continental Coal Company and the Kanawha & Hocking Coal & Coke Company; and these averments are admitted in the answer of the Sunday Creek Company, as also in the joint answer of the Hocking Valley and the Chesapeake & Ohio, and the coal property held by the Sunday Creek Company seems to comprise all the coal properties so accumulated as before shown. At the time of the incorporation of the Sunday Creek Company the Hocking Valley exchanged $3,236,300 par value of the stock it held in the Sunday Creek Coal Company for the same amount of stock of the Sunday Creek Company; and the Toledo & Ohio Central exchanged 2,037 shares of the preferred and 3,100 shares
stock it held in the Sunday Creek

like amount of the stock of the Sunday Creek Company. Thus the Hocking Valley and the Toledo & Ohio Central, in the proportions mentioned, acquired $3,750,000 par value of the total of $4,000,000 par value of the capital stock of the Sunday Creek Company; and on April 23, 1906, 2,488 shares were ordered to be issued in a single certificate in the name of the Central Trust Company of New York, to the end that they would not be issued except with its approval, the remaining 12 shares having apparently been issued as qualifying shares for directors.

The Trunk Lines' Purchase of a Majority of the Hocking Valley Capital Stock.—Prior to the merger so made of the coal interests of the Hocking Valley, to wit, June 29, 1903, five of the trunk line railroads, viz., Lake Shore & Michigan Southern Railway Company, Erie Railroad Company, Baltimore & Ohio Railroad Company, Chesapeake & Ohio Railway Company, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, entered into an agreement with J. P. Morgan & Co. to purchase from that company 69,242 shares of common capital stock of the Hocking Valley at a price and upon terms specified; Morgan & Co. having "arranged to borrow the moneys forthwith to make payment for said shares to the depositors under a syndicate agreement dated December 4, 1902." Morgan & Co. were to carry the loan for the benefit of the purchasing companies for three years; and such purchase was completed. The aggregate purchase price was $7,270,410, and each of the purchasing companies obtained one-sixth interest in the shares so purchased, except the Pittsburgh, Cincinnati, Chicago & St. Louis, which acquired two-sixths. As indicative of the effect of this upon the policy of the Hocking Valley, it is sufficient to state that an advisory committee (composed of representatives of the trunk lines) and the president of the Hocking Valley had frequent conferences relative to the financial affairs of the Hocking Valley and the coal companies in which it was interested, and the introduction or not of track connections between the lines [305] of the Hocking Valley system and the independent coal mining

Opinion of the Court.

operators and the like. Among the results of these conferences were the incorporation of the Sunday Creek Company for the purpose of handling the coal interests of the Hocking Valley, as before pointed out, and maintaining an operating system that was satisfactory to the trunk lines. One of the features of this operating system was to restrict rail connections with coal mines to such as were already in operation, and to refuse and by litigation to contest applications for rail connections with new mines. These conditions were in practical effect continued until the agreement of March, 1910.

Shares of capital stock in the Sunday Creek Company placed in names of trustees.—It should be stated here that, when the Sunday Creek Company was organized, the 5,137 shares of stock in that company, which belonged to the Toledo & Ohio Central, were issued in one certificate in the name of John H. Doyle, as trustee, who indorsed the certificate in blank and delivered it to the vice president and general manager of the Toledo & Ohio Central; and, further, in April, 1908, just before the Commodities Clause of the Hepburn Act was to take effect, it is testified that such stock was sold to him to be held as trustee for the stockholders of the Toledo & Ohio Central, in whose names its stock might from time to time be registered on the books of the company, and to whom any dividends should be paid. This arrangement was effected through the redelivery of the old stock certificate to the trustee, from which he at the time erased his original indorsement, and a contract executed by him and the Toledo & Ohio Central bearing date April 30, 1908; and this certificate and contract are still in his possession. After the date of this contract the trustee on two or three occasions issued a proxy to the president of the Sunday Creek Company, at his request, to vote the stock at annual meetings; but the trustee has not received any request or any suggestion from the Toledo & Ohio Central, or the officers of any other railroad company, with respect to the giving of proxies or the voting of the stock. On April 30, 1908, another contract, similar to the one so made between John H. Doyle and the Toledo & Ohio Central. - into

between the Hocking Valley and the Central Trust Company of New York, respecting the shares of the Hocking Valley in the Sunday Creek Company. After reciting that the Hocking Valley is the owner of 32,375 shares of the Sunday Creek Company (also, among other things, that all these shares with others were pledged through a trustee as collateral security for the bonds issued under the first consolidated mortgage of the Hocking Valley and the Buckeye Coal & Railway Company, and that in view of the penalties imposed for violation of the Hepburn Act (act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]) and of a desire to obey the law if constitutional, and at the same time to preserve to the owners of the capital stock of the railway the equity in such coal properties, which could not be disposed of by reason of such pledge), it was agreed that the railway company had sold and assigned to the trustee all its interest in such shares of stock, subject to the lien of the mortgage and the rights of the boldholders thereunder, in trust, for the proportionate benefit of the holders [306] of record of the stock of the Hocking Valley and for any distribution of its assets; that the trustee should have the right to vote the shares of stock at all meetings of stockholders of the company, to collect dividends, and (if the Hocking Valley is not in default under its mortgage) to distribute them among the holders of the stock. The only other provisions of the contract so made with John H. Doyle and the Central Trust Company that need be noticed are set out in the margin.[2]

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[2] "In the event, however, that the said Supreme Court shall decide said Commodity Clause of said Hepburn Act constitutional, then said trustee shall dispose of the equity in said coal stocks sold and assigned to it in trust for the purposes of this agreement (subject, however, to the lien of the first consolidated mortgage, and its rights as pledgee trustee thereunder), when and as directed in writing by the persons, firms, or corporations holding and owning of record a majority in amount of the stock of the Railway Company as hereinafter provided, and when such sale or distribution is made by the trustee hereunder, and the entire proceeds, whether of stocks, bonds, moneys, or other securities, shall have been actually paid to and received by the said trustee, then the said trustee shall distribute, less

Nothing further has been done with the stock of the Sunday Creek Company, and no sale or other disposition of the coal properties has been made in pursuance of these trusts or otherwise. The railroad control of the coal interests remained practically the same, at least until the date of the March agreement, as it was before.

Conclusion respecting situation prior to March agreement of 1910.—We are bound to hold that the situation described was indefensible under the Anti-Trust Act; indeed, no attempt has been made here to justify it. It is quite plain that by the reorganization commenced in 1899 and the course pursued thereafter until the trunk lines obtained their interests in the Hocking Valley the purpose was to unite and hold the four railroads,[3] and their several coal interests under a single controlling power; and we are satisfied from the evidence that this design was consummated at the instance of such companies, and finally rendered more secure through the interests and indirect control of the trunk lines. One of the reasons offered to induce and defend the reorganization was the existence of "undue and bitter competition." After stating that the principal business of the Columbus, Hocking Valley & Toledo (the predecessor of the Hocking Valley) was the transportation of bituminous coal from mines on adjacent property, it was declared that the business was strictly and intensely competitive, [307] and that the field in Ohio was covered by seven railroad lines (including in their number the lines

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its proper charges and expenses, all such proceeds in kind received from the disposition of said stocks, among such persons, firms, and corporations, their successors and assigns, as shall be stockholders of record of the Railway Company on the first day of the months in which said proceeds and all of them shall have been finally received, pro rota in proportion to their said record holdings of stock of the Railway Company. Any such sale or disposition, however, it is understood shall be made subject to the lien of the first consolidated mortgage thereon and to all the terms and conditions of the said mortgage, and only in the event that said Railway Company is not then in default of any requirement of said mortgage."

[3] The Columbus, Hocking Valley & Toledo, the Central, the Columbus, Sandusky & Hocking, an Michigan Railway Companies.

of the present Hocking Valley, the Toledo & Ohio Central, and the Columbus, Sandusky & Hocking, the predecessor of the Zanesville & Western), and that of these seven lines three operated in one district and the other four lines in a field lying east of that district. The three lines so alluded to could have been no others than the exclusively Ohio lines now in question. It was further declared that, in addition to the competition above indicated, the situation was complicated by the fact that of late years the West Virginia coals were rapidly supplanting the Ohio coals in the markets reached by the latter. And, in short, the evidence fairly shows that the union of interests so induced was carefully developed, and that its inevitable tendency and effect were to combine and monopolize the stocks and interests of these railroad companies and coal companies, and so to stifle competition in restraint of trade among the States within the settled meaning of the Anti-Trust Act.

[3, 4] *The conditions created by and maintained since the March agreement.*—Has the situation described been so changed by or under the agreement of March 12, 1910, as to entitle defendants as they claim to a dismissal of the bill? They forcibly urge that what was done prior to the March agreement has nothing to do with what has been done since. Objections were continuously made to the introduction of evidence tending to show conditions existing before the agreement. Complainant insists that what followed the execution of the March agreement was but a continuation of what preceded it. The fact that we have considered the evidence shows, of course, that we regard it as admissible. It can not escape notice that some of the defendants were parties to such earlier transactions, and that other acquiesced in and adopted such transactions before the March agreement was made. *Lincoln* v. *Claflin*, 74 U. S. (7 Wall.) 132, 138, 19 L. Ed. 106; *United States* v. *Standard Oil Co.* (C. C.) 152 Fed. 290, 294, per Sanborn, circuit judge, and Circuit Judges Van Devanter, Hook, and Adams concurring. The acts and transactions of the first period therefore ought to aid in some measure to elucidate the intent and effect of the March agreement, and of the acts and transactions of

Opinion of the Court.

the parties since, no matter what conclusion may be reached touching the second period. *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 76, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *Darius Cole Transp. Co.* v. *White Star Line*, 186 Fed. 66, 108 C. C. A. 165 (C. C. A. 6th Cir.); *U. S.* v. *E. I. Du Pont De Nemours Co.* (C. C.) 188 Fed. 128, 134.

[5] *The March Agreement.*—The agreement was signed by the Lake Shore and the Chesapeake & Ohio, and, so far as now material, in substance provided that the Lake Shore would purchase from the Hocking Valley the bond it held of the Middle States Construction Company, which, as stated, was exchangeable for the entire capital stock of the Toledo & Ohio Central (such stock to carry with it, for the benefit of the Toledo & Ohio Central, the ownership of 45,100 shares of stock in the Kanawha & Michigan, 5,137 shares of stock in the Sunday Creek Company, and the entire capital stock in and all the bonds of the **[308]** Zanesville & Western) at an aggregate purchase price of $10,197,874.67; and would make provision for loaning to the Sunday Creek Company as needed and on its notes $1,143,110.50. Such purchase to be coupled with an agreement that a contract for 25 years would be made and should provide that the line of the Hocking Valley and the line of the western division of the Toledo & Ohio Central, between their terminals at Toledo and their connections with the Kanawha & Michigan at Chauncey, might (for cost alone of maintenance and operating expenses according to joint usage) be used at the option of either for the movement of its through freight trains; that an additional agreement should be made to protect the Toledo & Ohio Central and the Hocking Valley under their previous guaranty of bonds of coal companies, and given (as before stated) under an agreement for an equal division of the coal traffic derived from the properties of such coal companies; that an arrangement for distribution of the business, so far as could legally be made, should be effected to protect the interests of the Toledo & Ohio Central and the Hocking Valley respecting their guaranty of such coal bonds. Upon making such purchase, tl re was to sell to the Chesapeake & Ohio 22,550 wha

& Michigan for $1,623,600 and 11,540 shares of the Hocking Valley for $1,384,800 (which latter stock seems to have been the one-sixth interest that the Lake Shore acquired at the time of the purchase made by the trunk lines). Still another contract was to be made "for trusteeing or otherwise jointly handling" the 45,100 shares (a majority of the stock and called the "controlling interest then to be owned by the two companies") in the Kanawha & Michigan. In case the stock was so placed in trust, provision was to be made for such trackage agreements with the Kanawha & Michigan as would protect the purchasing companies against loss of control of the property. Privilege was to be given to make certain connections between the Kanawha & Michigan Railway with the Virginian Railway or with the Lake Shore or Chesapeake & Ohio, the intent being that the lines of the Kanawha & Michigan could be used to the fullest extent by either of the purchasing companies in building up its interest either in local territory on the Kanawha & Michigan or in making through routes and connections beyond it, protecting, however, all the stockholders of that company. Provision was also made for acquiring all or part of the outstanding stock of the Kanawha & Michigan; for having the Kanawha & Michigan purchase the securities of the Pomeroy Belt Railway Company and indemnifying the Hocking Valley against liability assumed by it in the purchase thereof and granting to it a trackage right over such belt road, etc., for securing to the Hocking Valley trackage between Athens and Hobson over the Kanawha & Michigan for Hocking Valley through business from or to its line between Gallipolis and Pomeroy. The whole agreement was made subject to a condition that the other roads embraced in the trunk line purchase, before pointed out, should sell their holdings in the stock of the Hocking Valley to the Chesapeake & Ohio.

The Chesapeake & Ohio thereupon acquired the holdings of the other trunk lines of Hocking Valley stock, which, with the one-sixth it had **[309]** previously obtained through ...k lines syndicate purchase and the one-sixth derived ...e March agreement, gave to the Chesapeake & Ohio

69,240 shares of such stock. The preferred stock of the Hocking Valley was retired in April, 1910, leaving 110,000 shares of common, of which the Chesapeake & Ohio now owns (through increase of its holdings) 88,258 shares, and that company and the Lake Shore now each own 40,271 shares of the stock of the Kanawha & Michigan (being 80,-542 of a total capital of 90,000 shares). The result is that, instead of five trunk lines holding as formerly, only two, to wit, the Lake Shore and the Chesapeake & Ohio, now hold the controlling power, it is true through independent ownerships, in the Hocking Valley, the Toledo & Ohio Central, the Kanawha & Michigan, the Zanesville & Western, and also (subject to the trusts and pledge before stated) the Sunday Creek Company. Their interests in the Sunday Creek Company cover its entire outstanding capital stock (included in this are the 12 qualifying shares belonging to the Hocking Valley).[4]

Now it is to be observed of the March agreement that its avowed purpose was not to avoid violation of any Federal act, but to comply with the decree of the Ohio Circuit Court in the quo warranto case. Such a purpose might, it is true, be entirely consistent with the Federal Anti-Trust Act; but whether this was so here must be tested by the intent to be inferred both from the agreement and the extent and nature of the control thereby secured over the railroads and the coal traffic and other commerce dependent on them (*United States* v. *St. Louis Terminal*, 224 U. S. 394, 395, 32 Sup. Ct. 507, 56 L. Ed. 810); and such intent and control may, we think, be further ascertained from comparison of important features of the situation existing before the agreement with some of those found in the situation created under it. In applying these tests, it should be stated in the outset that the Government has failed in several respects to sustain the averment that there has been since the agreement a continuation of the same conditions as those existing before. Admittedly a change in the ownership of the stocks and bonds of the railroads has been made under the agreement,

[4] Compare holding shown by stipulation (Rec
stated in Exhibit E, to bill.

as before pointed out; and it must be conceded under the evidence adduced that the independent coal operators in the coal fields in question have received greater concern and accommodations at the hands of the railroads since the agreement than they were given before. But we are convinced that the changes so wrought in ownership of stocks have resulted in a concert of action and control of the railroads and coal interests secured by the agreement, which is inconsistent with the rule requiring freedom of competition in commerce among the States; and that rule is too firmly established to be shaken by argument against the beneficial results ascribed to it. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 87, 88, 33 Sup. Ct. 53, 57 L. Ed. 124; *United States* v. *St. Louis Terminal, supra*, 224 U. S. 401, 32 Sup. Ct. 507, 56 L. Ed. 810; *Loewe* v. *Lawlor*, 208 U. S. 274, 293, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Northern Se*[**310**]*curities Co.* v. *United States*, 193 U. S. 331, 332, 24 Sup. Ct. 436, 48 L. Ed. 679; *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 676, 16 Sup. Ct. 705, 40 L. Ed. 838; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16, 15 Sup. Ct. 249, 39 L. Ed. 325; *Chesapeake & O. Fuel Co.* v. *United States*, 115 Fed. 619, 620, 53 C. C. A. 256 (C. C. A. 6th Cir.); *United States* v. *Standard Oil Co.* (C. C.) 173 Fed. 177, 188 (C. C. A. 8th Cir.).

Evidence was adduced to show that, owing to litigation and other causes, some of the provisions of the March agreement have not been carried out; and some of the evidence tends to show that, if all its provisions had been carried into effect, it would have resulted beneficially to the volume of traffic and those interested in it along the lines of the roads in question. This does not indicate a purpose not to carry out the March agreement ultimately; but it does show that a virtual consolidation of all these naturally competing roads (coupled with the division of the coal traffic provided for), so far as concerns the through traffic in coal to the lakes, is necessary to accomplish the result stated, although it does not purport to show how long such increase in volume would last. It is contended [illegible]arned counsel, however, that all the provisions of the

agreement are valid and enforceable, so long at least as the interested stockholders themselves are satisfied with its performance.

Moreover, evidence was offered to show that the Ohio roads are controlled and operated independently of one another and of either the Lake Shore or the Chesapeake & Ohio or both; and similarly as respects the Sunday Creek Company, and all these roads either collectively or separately. It is true that the officers of the railroads and the railroad offices are distinct, and this is true of the Sunday Creek Company; also that the managerial officers of these subordinate companies have been instructed to exercise their own judgment respecting the interests they represent, and yet the natural and probable effect of all this needs but little consecutive thought. Such officials are at last dependent for their positions upon the will of the two trunk line companies controlling the stock; and it is vain to say that such officers do not become sensitive to the interests and policies of the real masters of the situation. Illustrations of this, as also of the effect of the new régime upon interstate commerce and trade, are contained in the evidence relating to both the coal and railroad properties. We have seen that the Sunday Creek Company still holds the same title to the coal properties that it held before the execution of the agreement of March, 1910; and that the Chesapeake & Ohio and the Lake Shore together have been brought into the same relation to the entire capital stock of this coal company that the Hocking Valley alone previously bore to it.[5] In the March agreement no allusion was made to the trust agreements under which the stock of the Sunday Creek Company was on [311] April 30, 1908, placed in the names of trustees. The shares placed (rather continued) in the name of John H. Doyle, as trustee, were in the March agreement treated as the prop-

[5] It should be stated that as early as June, 1905, provision was made by the Sunday Creek Company for purchasing certain trust certificates representing the beneficial interests in the stock of the other two coal companies which are parties to this cause, and this arrangement seems to have been carried out.

erty of the Toledo & Ohio Central; and the same general policy concerning the coal handled by the Sunday Creek Company that prevailed before the March agreement has been pursued since. This has resulted in the continuance of an equal division substantially of the coal traffic originating on the Kanawha & Michigan between the Hocking Valley and the Toledo & Ohio Central. All the coal carried in Kanawha & Michigan equipment is so divided. While the coal that is carried in the equipment furnished by the other two companies, respectively, is divided according to such equipment, yet it would seem from the correspondence and testimony that the desire and effort are to equalize either the cars received or the advantages and consequent profit of transportation, say, as between coal and coke, since coke appears to yield more freight revenue to the carrier than coal. Further, some of the evidence (concerning at least the conduct of the Lake Shore) discloses an apparently asserted right to demand, rather than a design simply to persuade, the allowance of such division; and seemingly the officers of the Kanawha & Michigan are disposed to yield it in the same spirit. This augments the similarity in purpose between the division now made of the coal traffic and the division that was admittedly made prior to the March agreement in obedience to contract.

We do not overlook the testimony to the effect that this additional agreement has not been executed; but it is not perceivable how the companies can in substance do the same thing that the agreement provided for, and escape its effect on the ground either that it has not been reduced to writing and signed, or that such a division is fair. In short, our interpretation of the evidence is that this division of traffic is not due alone to a desire to be fair to connecting companies, but that it is actuated also by a purpose practically to carry out the provision of the March agreement in this behalf, and so protect the Toledo & Ohio Central and the Hocking Valley as joint guarantors "on the bonds of certain coal companies for equal division of the coal from [illegible] coal properties." Such a provision or practice is in[illegible]nt with the statutory right accorded to shippers

since 1910, say along the Kanawha & Michigan, to secure the benefit of competitive through rates by routing their own traffic by way of either the Hocking Valley or Toledo & Ohio Central, according as they might be able through perfectly legitimate means to induce the one or the other company to file and publish lower rates. See amendment to section 15 of Interstate Commerce Act (act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), passed June 18, 1910, c. 309, § 12, 36 U. S. Stat. L. 552 (U. S. Comp. St. Supp. 1911, p. 1301), striking from amended section 15, act June 29, 1906, c. 3591, § 4, 34 Stat. L. 590 (U. S. Comp. St. Supp. 1911, p. 1301), the limitation: "Provided no reasonable or satisfactory through route exists." That it would be entirely practicable for shippers of coal to secure, with respect to through traffic, a substantial competition with the Hocking Valley and the Toledo & Ohio Central, but for the joint ownership and control **[312]** of the Kanawha & Michigan, seems to us obvious. The president of the Kanawha & Michigan, and its general freight agent, testified, in substance, that they had made no effort to secure from the Hocking Valley or the Toledo & Ohio Central in favor of their own company a greater division of the freight rate charged for through traffic; in other words, the motive is lacking to bring about real competition between these parallel roads. Nor does it appear that the officers of either the Hocking Valley or the Toledo & Ohio Central have done anything respecting a greater or less division of the freight rate charged for through traffic. And we do not discover that the officers of the Sunday Creek Company have ever sought to induce any of these railroads to file or publish lower freight rates; and the president of the company (who has filled the office since June, 1910) testified:

"We do not do any routing * * * unless it is where coal must be delivered on one road or the other."

Further similarity between the course pursued before the March agreement and since is to be found in the "operating proposition" as it is characterized
which "practically makes each road

and the Toledo & Ohio Central) a double track railroad." The arrangement con..sts of moving the north-bound through freight trains of the Toledo & Ohio Central over the Hocking Valley Railroad from Hobson to Fostoria, and of returning the south-bound freight trains of the Hocking Valley over the western division of the Toledo & Ohio Central from Hickox to Columbus; and this is a continuation of the same reciprocal use that was commenced in 1901. Stress is laid both in the evidence and argument upon the economy of this interchange of facilities, since it secures easier grades over the Hocking Valley, as compared with those of the Toledo & Ohio Central, and avoids the necessity of building double tracks and of operating opposing trains over single track roads with the usual sidings. These advantages may be conceded from an operating point of view; yet the logic of it all would in the end destroy competition between parallel roads generally. The reciprocal use in this instance developed only with the non-competitive period of these railroads. It is not meant by this that there may not be circumstances under which reciprocal trackage arrangements may to a certain extent be lawfully entered into and carried out. Nor is it meant that this trackage arrangement, standing alone disassociated from the joint ownership and control of the Kanawha & Michigan, would violate the Federal Anti-Trust Act. What is meant is that this trackage arrangement, considered in connection with the other facts pointed out, tends to disclose a unity of purpose and concert of action on the part of the companies involved to maintain conditions that are inimical to effective competition. Testimony was offered to show that giving to the Chesapeake & Ohio and the Lake Shore equal interests in the Kanawha & Michigan and adding the advantages of this reciprocal use of tracks, operate to stimulate rather to retard the transportation of coal, and in fact have resulted in substantial increase in volume of traffic; and further, that if these arrangements were broken up, the traffic in West Virginia coal would be monopolized by the Kanawha & Michigan and the Tole[313]do & Ohio Central. This loses [illegible] the natural development of the coal fields tribu-

tary to the Kanawha & Michigan, which should occur under normal conditions. It also evades the obvious question whether, if the Kanawha & Michigan were owned and operated independently of both the Hocking Valley and Toledo & Ohio Central, and those roads were brought into competition for the traffic originating on the Kanawha & Michigan, there would not be a still greater stimulus given to interstate trade than has heretofore existed. There would, in that event, be neither reason nor opportunity for a monopoly of such traffic by the Kanawha & Michigan and Toledo & Ohio Central. The conceded easier grades of the Hocking Valley furnish adequate answer to the suggestions of such a monopoly. *Pearsall* v. *Great Northern Railway*, 161 U. S. 676, 16 Sup. Ct. 705, 40 L. Ed. 838; *United States* v. *Union Pacific R. R. Co.*, *supra.*

Insistence is made that a number of the things complained of were in and of themselves lawful, and so, in effect we take it, their union or joint use could not become unlawful. For instance, it is urged that it would have been well within the power of the Lake Shore to purchase the entire stock of the Toledo & Ohio Central and the Kanawha & Michigan, because the Kanawha & Michigan is a continuation of the Toledo & Ohio Central. Likewise it is insisted in respect of the Chesapeake & Ohio that it possessed charter power to purchase the stock of the Hocking Valley, and that it was both its purpose and right to secure control of a railroad leading directly to the lake ports. Let these claims be conceded for sake of discussion; still, does it follow that the Lake Shore and the Chesapeake & Ohio could lawfully become joint and equal owners in the controlling portion of the stock in the Kanawha & Michigan? Could they at the same time add to this mutual control of that road the reciprocal trackage arrangement respecting the other roads, and so virtually consolidate these railroads as respects the through traffic in coal? These questions are stated, not merely with reference to the apparent violation involved of the statutory policy of Ohio respecting parallel and competing railroads (*State* v. *Hocking Valley*, 12 Ohio Cir. Ct. R. [N. S.] 66, 67, before cited), but particularly with respect

to the effect that such joint ownership and trackage arrangement must have upon interstate commerce. The policy of the United States and of Ohio, as expressed by legislation and judicial interpretation, is quite as distinctly opposed to any union of ownership and arrangement involving the power to control parallel railroads or the transportation of traffic that is tributary to and must pass over one or both of them, as it is to formal consolidation of such railroads. *Northern Securities case, supra,* 193 U. S. 362, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States* v. *St. Louis Terminal, supra,* 224 U. S. 395, 32 Sup. Ct. 507, 56 L. Ed. 810; *United States* v. *Union Pacific R. R. Co., supra*; *State* v. *Hocking Valley, supra.* We have seen that the Ohio Circuit Court ousted the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan. The Hocking Valley, it is true, does not now own stock in the Kanawha & Michigan; but the Chesapeake & Ohio does, and it also owns the controlling interest in the Hocking Valley. **[314]** The Chesapeake & Ohio thus holds stock in two roads which are in substantial degree parallel and naturally competing. Can this result, or the results before pointed out as brought about since the March agreement was executed, be rightfully traceable to the charter powers of these two railroad companies, the one to reach the lake ports and the other the coal fields?

It cannot be that those companies can justify their separate stock purchases of the control of these roads, and also escape responsibility for the inevitable tendency of the present conditions to stifle free competition simply on the theory that the companies holding the legal titles to the roads are alone responsible for this result; for that would be to overlook, not only the manifest unity of purpose of the Lake Shore and the Chesapeake & Ohio, but also and especially their acquiescence, not to say concurrence, in the acts of the subordinate companies. This cannot be avoided on the ground that corporate ownership of stock in railroad corporations created by a State is not interstate commerce (considered in the Northern Securities case); nor, in the present instance, by the fact that capital stock in two of the compet-

ing roads is held separately by two corporations instead of one corporation; for the other matters involved here, or anything like them, were not present in the Northern Securities case. To ignore such matters would be to furnish an easy method to frustrate the statutory inhibitions in question. Indeed, if these two purchasing companies are not in effect equivalent to a committee to regulate rates, certainly the subordinate railroad companies under their control are, within the meaning of the concurring opinion of the late Justice Brewer, in the Northern Securities case. When speaking of the single holding company in question there, the learned justice said (193 U. S. 362, 24 Sup. Ct. 467, 48 L. Ed. 679):

"In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates."

If the intention of placing the ownership of the stocks in question in the Lake Shore and the Chesapeake & Ohio can be rightly inferred from what has actually been done since, "the purpose to combine and by combination destroy competition" (Northern Securities case, 193 U. S., at page 362, 24 Sup. Ct. 467, 48 L. Ed. 679) existed when the March agreement was executed, quite as certainly as such purpose was held to exist in that case "before the organization of the corporation, the Securities Company." The form given to a combination is of no consequence. As the learned Chief Justice said in the Tobacco case, 221 U. S. 181, 31 Sup. Ct. 648, 55 L. Ed. 663:

"* * * It was pointed out (in the Standard Oil case) that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."

It hardly need be said that the cases relied on by the defense, like *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed. 721, 728, 94 C. [315] C. A. 13, decided by the present Mr. Justice Lurton in this court, and by Judge Knappen in the court below, have no application.

There is to be added the apparent purpose of the Lake Shore and the Chesapeake & Ohio to retain their relations with the Sunday Creek Company. The feature of the trust agreements of present importance is quoted in the margin of an earlier portion of this opinion. It provided that, in case the Supreme Court should hold the Commodities Clause constitutional, each trustee was to dispose of the equity in the railroad companies in the Sunday Creek stock, as directed by the holders of a majority of the capital stock of the Hocking Valley and the Toledo & Ohio Central respectively, and distribute the entire net sales proceeds among such holders. It need not be stated that the Commodities Clause, as construed by the Supreme Court, has been held to be constitutional. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458. The first of these cases was decided May 3, 1909, about 10 months prior to the date of the March agreement, and considerably more than a year before the commencement of this suit. It is said that such sales cannot be enforced in this case, because of infirmities in the pleadings. If in the view we take of the evidence this objection can be regarded as material (*Lockhart* v. *Leeds*, 195 U. S. 427, 436, 25 Sup. Ct. 76, 49 L. Ed. 263), we perceive no sufficient reason why at this stage of the case the objection cannot be met by amendment. *Neale* v. *Neale*, 76 U. S. (9 Wall.) 8, 9, 19 L. Ed. 590; *The Tremolo Patent*, 90 U. S. (23 Wall.) 527, 23 L. Ed. 97. As respects the power of the court to require such sales and distributions to be made, we think it is clearly given by section 4 of the Anti-Trust Act (26 U. S. Stat. 209; *Standard Oil case*, 221 U. S. 78, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *Union Pacific case, supra*); and if the trustees or the absent stockholders in the Hocking Valley are indispensable parties defendant, they may be brought in (*Hoe* v. *Wilson*, 76 U. S. [9 Wall.] 501, 504, 19 L. Ed. 762; *Rogers* v. *Penobscot Mining Co.*, 154 Fed. 606, 616, 83 C. C. A. 380). It is to be observed that there is no Ohio legislation authorizing railroad companies to hold shares of stock in coal companies. The

Opinion of the Court.

Ohio Circuit Court held in the quo warranto suit before cited that the Hocking Valley was not a "kindred" corporation within the meaning of the statute empowering private corporations to hold shares of stock "in other kindred but not competing private corporations," etc. Section 8683, 4 Ohio Gen. Code, 239; 12 Ohio Cir. Ct. R. (N. S.) 59-63. If these companies are to be allowed potential control both of producing and transporting coals in 100,000 acres of coal lands, it is difficult to see why in spite of the Commodities Clause common carriers may not mbine the benefits of transportation with the benefits arising from the control of any of the other necessaries of life, no matter in what quantities. *Attorney General* v. *Great Northern Ry. Co.*, 29 Law Journal (N. S. Equity) 798, 799; approved in *New Haven R. R.* v. *Interstate Com. Com.*, 200 U. S. 393, 26 Sup. Ct. 272, 50 L. Ed. 515.

[316] The only remaining matter needing consideration is the testimony offered in open court tending to show that the grades of the southern division of the Hocking Valley are so difficult as to prevent successful movement over it of through coal trains; and, further, that by reason of the configuration of the territory adjacent to the Kanawha River there is no room for the construction of a track additional to that of the Kanawha & Michigan on the one side or to the tracks of the Chesapeake & Ohio on the other.

Decisions are cited to show that these physical conditions warrant alike disuse of the southern division for through coal service and the joint control acquired of the stock in the Kanawha & Michigan. Among these is *United States* v. *Union Pacific R. Co.* (C. C.) 188 Fed. 102, reversed in part December 2, 1912 (226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124, before cited). We think the undisturbed portion of the decision below is distinguishable, and what is said in this behalf will serve to indicate our views concerning the other cases cited in connection with it. The material points of distinction appear in certain facts: (*a*) The San Pedro line from Salt Lake to [illegible]
found to be practically a continu[illegible]
or (its subsidiary company[illegible]

not a natural competitor of any other line in question; (*b*) the physical obstacles encountered on the San Pedro line find no analogy here, unless it be south of the Ohio River and adjacent to the Kanawha & Michigan or a portion of the Chesapeake & Ohio, but it is not shown that connection between the Chesapeake & Ohio and the Hocking Valley is not otherwise reasonably available; (*c*) there was nothing in the Union Pacific case to correspond in any way with the combined coal interests here and the relations between them and the present railroad companies. In that case the failure to build two projected parallel lines of railway between Salt Lake City and Los Angeles was held not to be violative of the Anti-Trust Act; while here, without repeating what has been said before respecting the present railroads and coal properties, the resultant fact cannot be ignored that between Toledo and Kanauga, two actually existing parallel lines of railroad have practically been converted into one line so far as respects the through traffic in coal. The disuse of the southern division of the Hocking Valley is claimed to be justified in the face of several admitted facts. It was constructed as a substantial portion of the Hocking Valley system, and there is no showing that it was not projected by experienced railroad men. At the time the reorganization was commenced in 1899, the railroad agencies concerned found that there had been undue and bitter competition in the coal traffic dependent upon the railroads operating in the Hocking field. The suppression of competition worked out through that reorganization was obviously calculated to engender neglect of either the Kanawha & Michigan north of the Ohio River or the southern division of the Hocking Valley as respects the movement of heavier trains. The railroad defendants here were participants in the policy that succeeded that plan of reorganization. And yet it is in effect insisted that the original plan and construction of the road, as well as its continued maintenance, [317] should be condemned as part of a through line and its practical abandonment for that purpose sanctioned by judicial decree.

There is a clear distinction between the power to relief respecting past failure to construct one of two

projected parallel lines, as occurred in the Union Pacific case along the course of the San Pedro division, and the power to prevent the elimination of one of two parallel roads in actual existence and operation. After all, the difficulty north of the Ohio River is due alone to differences in grades, and it may be judicially noticed that grades may be changed. *Delavan* v. *New York, N. H. & H. R. Co.* (Sup.), 137 N. Y. Supp. 207, 212. It hardly would be contended, even apart from express statutory inhibition, that such differences would warrant formal consolidation. It may be said of this situation, as Mr. Justice Lurton said December 16, 1912, of a situation involved in the cases of the Reading Company concerning prices of coal at the seaboard, that "the situation is therefore one which invites concerted action and makes exceedingly easy the accomplishment of any purpose to dominate the supply and control the prices" of coal at the lake ports and beyond. The paramount evil here is the joint ownership of the Kanawha & Michigan, and, so long as that continues, effective competition will we think remain impossible. Effective competition is not limited alone to a matter of freight rates. It embraces a variety of other subjects, such as quality and promptness and sufficiency of service both as to equipment and roadbed, which are dependent above all upon separate and independent ownership or control alike of the competing roads and of the commerce under compulsion to use them. Surely the necessity to maintain such conditions as these is not affected, as claimed, by anything contained in the act to regulate commerce; for plainly that act was not intended to supplant either the settled rule respecting freedom of competition or the purpose of the Anti-Trust Act to deal with corporate ownerships or agreements that constitute barriers to such competition.

In the Northern Securities case, after declaring the comprehensive character of the statute, Justice Harlan expressed the prevailing general rule, as we understand it, thus (193 U. S. 332, 24 Sup. Ct. 454, 48 L. Ed. 679):

"That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combin[illegible] ts

or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition."

Are the averments of the bill charging continuance in different form of the combination begun in 1899, so far supported by the proofs offered in that behalf as to justify the granting of relief touching the situation created by and under the March agreement? Comparison of that agreement and what has been done under it, with the first situation, cannot we think fail to show material identity between the two periods in dispute. True, combination by the March agreement [318] or by anything done since then is denied by the answers, and testimony was introduced in support of the denial. We need not recapitulate either the terms of the agreement or the facts and conditions already stated. We cannot believe that the changes in ownership of stocks, in managerial officers and the like, have operated to relieve the railroads and coal interests in question from the influence in practical effect and consequence of a unified control. It cannot be that, in the absence of intent or design, substantially the same things of controlling importance could have been worked out during the later period that were before. It is not necessary that the proofs should show that precisely similar methods were adopted to bring about the continuance averred, or that all the parties theretofore engaged, like the withdrawing trunk lines, continued as actors. The results attained and continued through a unity of purpose and concert of action by those remaining in the combination at and after the date of the March agreement are the true tests of the trend of the evidence as an entirety.

Upon the whole we conclude that the March agreement, and what has been and is being done under it, operate unreasonably to restrain and monopolize commerce among the States, and consequently that complaint is entitled to relief; but the precise extent and nature of relief to be awarded cannot at this stage be determined. The case has been tried on the issue of continuance or not of the antecedent combination and restraint; and this has resulted in leaving the

court unadvised of the claims of counsel for either side as to the nature and extent of relief, if any, that should be granted. However, we now hold (1) that the equity of the Lake Shore and of the Chesapeake & Ohio in the capital stock of the Sunday Creek Company shall be disposed of by absolute sale, and to this end the trustees in whose names such stock is held shall be made parties defendant to this suit (Bates Fed. Eq. Proc., § 639; *Perrin, Adm'r*, v. *Lepper*, [C. C.] 26 Fed. 545, 548; *St. Louis, etc., Ry. Co.* v. *Wilson*, 114 U. S. 60, 62, 5 Sup. Ct. 738, 29 L. Ed. 66; *Woodward* v. *McConnaughey*, 106 Fed. 758, 45 C. C. A. 602 [C. C. A. 9th Cir.]); (2) that the joint ownership and control of the Kanawha & Michigan must be terminated. The questions not decided and upon which leave will be given for further argument are (*a*) whether the holders of capital stock in the Hocking Valley, other than the Chesapeake & Ohio, are indispensable parties to the cause; (*b*) in what manner the termination of the joint ownership and control of the Kanawha & Michigan shall be effected; (*c*) whether in connection with the means adopted for the termination of such joint ownership and control of the Kanawha & Michigan the reciprocal trackage arrangement over the Hocking Valley and the Toledo & Ohio Central must be terminated; and (*d*) to what further extent and in what further respects, if any, relief shall be granted touching the control and operation of the other railroads mentioned.

Such further argument will be had at a date hereafter to be fixed between January 21st and 31st next.

KNAPPEN, Circuit judge, concurs.

[319] DENISON, Circuit Judge (concurring in part, dissenting in part).

I quite agree that the present ownership of the Sunday Creek stock by or for the railroads is unlawful and that the coal companies and the railroads should be separated. This conclusion must be tentative, until the other necessary parties can be heard, but it seems probable that all the facts have been developed. I would base this result on

the Commodities Clause of the Hepburn Act and the "mere instrumentality" theory of the Lehigh case, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458, rather than upon the Sherman Act; but the use of either basis brings the same result. Beyond the matter of the coal companies, and in the mere present relation of the railroads to each other, I am unable to see any monopoly or restraint of commerce forbidden by the Anti-Trust Law. Some of the considerations compelling me to this opinion are these:

1. It is true that the history of their former relations during the 1900–1910 period must be studied for whatever bearing it may have on their present intent; but this study discloses to me not continuance but change, not identity but antithesis. The Hocking and the Central[1] were parallel roads with common termini and with other common points. They had competed bitterly for the Hocking coal district traffic to Columbus and to Toledo, as well as for all other traffic originating on their lines and destined to common points. In 1900 the Hocking bought the Central, and from then until March, 1910, this naturally and theretofore actually competing line was owned by the Hocking. The Hocking dictated the policy of both. Both had the same directors and managing officers. The merger was complete. Competition was not restrained; it was eliminated. No more perfect union and joinder in operation, while saving the former corporate identity of each, could be stated. After March, 1910, these two roads continued physically as before; but neither the Hocking nor its dominating stockholder had any ownership of the Central or had any interest, direct or indirect, in such ownership; nor did the Central or its dominating stockholder have any ownership of or direct or indirect interest in the Hocking. No director or officer of one road was director or officer in the other,

[1] I will refer to the Hocking Valley Railway Company as "the Hocking"; to the Toledo & Ohio Central and the Zanesville & Western Railroads as "the Central"; to the Kanawha & Michigan Railway Company as "The Kanawha"; to the Lake Shore & Michigan Southern Railway Company as "the Lake Shore"; and to the Chesapeake & Ohio Railway Company as "the Chesapeake & Ohio" or "the C. & O."

or had any share in its management or operation. No more complete severance of the two roads could be formulated. There remained no connecting link (except the common control of the Kanawha, hereafter discussed).

2. Since March, 1910, there has been full and complete competition between these two roads (save only for the Kanawha traffic). As to all the Hocking coal district traffic bound for Columbus or Toledo, and as to all other business originating on these roads, competition is unimpaired. So reads all the evidence; there is no proof to the contrary. The competitive conditions prevailing before the unlawful merger of 1900 have been restored—excepting only that the rate-cut[320]ting war then in progress has not been resumed. Both roads maintain their rates against sudden or secret cuts, as they are bound to do by both State and Federal law. To base the assumption that they are combining in restraint of trade solely upon their maintenance of the same rates between common points would, by the same token, convict every railroad in the United States which is obeying the law; yet such assumption is, to my mind, the only basis for believing that such combination has existed since March, 1910 (still excluding from our thought and reasoning the Kanawha traffic).

3. The conclusion just stated—that there is no other basis for inferring a suppression of competition—is not affected by observing the joint trackage contract. It is true this contract was made during the period of undue intimacy, and probably it would not have been made between roads actively competing as strangers to each other; but this does not determine its character or effect. In March, 1910, the two purchasers (the Chesapeake & Ohio and the Lake Shore) of these roads found this joint trackage contract in existence. They saw that the entire physical and traffic situations on both roads were accommodated to this contract. They saw that it served, in large measure, as a substitute for double tracking each road; that it enabled each road to haul more traffic and give better service and at a less cost, and so, presumably, at a less rate, than either could otl

done, except by expending vast amount

that it was an operating arrangement having no connection whatever with competitive traffic seeking; that of itself it was of great and undisputed benefit to both railroads and to the shipping public; and of itself did not and could not work any harm to any interest, public or private. Under these circumstances, the purchasers preserved and continued this public and private benefit, and I cannot see how such conduct has any bearing, even evidential, to convict them of suppressing competition in traffic getting.

4. The conclusion that since March, 1910, competition in traffic originating on these lines has not been restrained is confirmed by the fact that there is no complaint by shippers of such traffic. Serious or long continued restraint of proper competition is a disease producing inevitable and well-known symptoms—discrimination, excessive rates, poor service, unfair practices, and the like. The relations now said to be unlawful had been in existence for a year when this bill was filed and for another year before the testimony was closed; and we did not have pointed out to us in the argument, nor have I seen in the record, any instance of any complaint by any shipper or consignee on any of these subjects.[7]

[321] 5. If I am so far correct, there remains for consideration among the primary inquiries only the matter of joint control of the Kanawha by the other two roads; and the conclusion which we reach as to whether or not this joint ownership and control, as developed in this case, are violative of the law, must, I think, determine the whole case. I agree that the fact of the ownership of this stock by the Chesapeake & Ohio and the Lake Shore, instead of by the Hocking and the Central, is not of itself controlling. The

[7] I do not overlook the broad complaint that the rates from the Hocking district were too large in proportion to the rates from the Kanawha district; but, in fact, all rates were fixed with relation to the Pittsburgh-Ashtabula rate. This rate was not made by these defendants, but it was the "keystone of the arch." When the commission reduced this Pittsburgh rate from 88 to 78 cents, the Hocking voluntarily reduced its Hocking-Toledo rate from 85 to 75 cents, and the 75-cent rate has been sustained by the commission. See rst. Co. Com'n R., opinion No. 1941, case No. 4274, *New Pitts-h Coal Co. v. Hocking Valley Ry. Co.*, vol. 24, p. 244.

presence of the former roads, instead of the latter, in the field of the problem, can affect only the question of the dominant intent in the whole transaction. The name in which they entered their Kanawha stock purchases means nothing. I agree, also, that the entire arrangement of March, 1910, was accompanied by, and in some degree depended upon, a clear understanding (and, therefore, an agreement) that the Kanawha should, so far as it could, divide its through north-bound traffic equally between the Hocking and the Central. This does not become less true because they never executed the contemplated written agreement, nor because their perfected understanding referred to a division that should be "fair" rather than to one that should be "equal." Under the anticipated conduct of all parties—equal furnishing of cars, etc.—no division which was not equal would be fair, and the two mean the same thing.

6. We are brought, then, to the general question when and how far the purchase, by two parallel and competing roads, of a common connecting and continuing road, under an agreement to divide the through traffic derived therefrom, violates the law, and then to the specific question of application to the facts of this case.

Purchase by one line of a connecting and continuing line has never been thought unlawful, although, if the purchasing line is one of two or more competing for the through traffic from the connecting line, such purchase, inevitably, strongly tends to destroy existing competition.[8] Such a joint purchase by two competing lines has never been held ipso facto unlawful. Indeed, the Supreme Court has said

[8] At one time the New York Central, the Erie, and the Lehigh competed at Buffalo for the east-bound through traffic from the Lake Shore, and the Michigan Central, Grand Trunk, and the Lake Shore competed for the west-bound through traffic from the New York Central. The purchase of the Lake Shore by the New York Central restricted, if it did not end, this competition, for not until June, 1910, could joint rates have been compelled, nor, if there had been through joint rates, did the shipper, until that time, have the right of selection. See 36 Stat. at Large, 552, 553. Formerly, a through joint route could be compelled only as there was no existing "practicable" through route. And see note 14 as to joint through routes after June, 1910.

Denison, J., dissenting.

(by what is probably a dictum, *Southern Pac. Co.* v. *Interstate Com. Com.*, 200 U. S. 559, 26 Sup. Ct. 330, 50 L. Ed. 585) that such competition is not the competition which an analogous statute was intended to preserve. In March, 1910, the first carrier had the right to select the continuing carrier. After June, 1910, this right belonged to the shipper, if he chose to exercise it; and it calls for a construction of the statute which has not yet been given to say that an agreement between carriers as to how they will divide and carry this kind of traffic (a very differ[322]ent thing from a pooling contract) or the carrying on of such division when this bill was filed is a monopolizing or restraint of trade or commerce contemplated by the act.[9] At the same time it is clear that competition between carriers for traffic from from one connecting line may affect the condition of the shipper upon the originating line, and I see no reason to doubt the proposition which, in this respect, must underlie the opinion of the court, viz, that the forbidden restraint *may be* found in this joint purchase of a common extension by two competing roads; but it seems clear that in a case of this class the criterion must consist in the principle stated by Mr. Justice Lurton in the St. Louis Terminal case, 224 U. S. 394, 32 Sup. Ct. 510, 56 L. Ed. 810:

"Whether it (the transaction in question) is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the act of Congress * * * will depend upon the intent to be inferred from the extent of the control thereby secured over the instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which that control has been exerted."

From this statement and from the very recent, familiar decisions of the Supreme Court, including the Union Pacific Merger case, supra, and the Reading case, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, it seems accurate to say that whether the situation created in March, 1910, operated in aid of interstate commerce or in the forbidden, unreason-

[9] Without doubt, two parallel roads might join in building, from a common terminus, and owning a new road connecting with and continuing both. Joining in buying an existing extension seems to stand, logically, on the same ground, unless, as matter of fact, the purchase was with the dominant purpose of stopping existing or normal competition.

Denison, J., dissenting.

able restraint thereof will depend upon (1) the extent of commerce restraining power inherent in the joint ownership of the Kanawha; (2) the characterizing intent and purpose of this joint ownership to be inferred not only from the power secured, but from all the proofs; in other words, whether such restraint of competition as was inherent in the joint ownership would amount to a primary, and therefore direct, restraint of trade, or would rather be incidental to ends primarily lawful; and (3) the amount of restraint, actual or potential, which did take place.

7. If this joint ownership has the prohibited effect, it must be found (*a*) in competition as to divisions; (*b*) in competition as to rates; or (*c*) in competition as to service.

(*a*) Clearly this joint ownership tends to prevent the Central and the Hocking from bidding up against each other in the divisions that they will offer to the Kanawha for this traffic, and so the other Kanawha stockholders might make less money. This is not the kind of competition which the statute desires to preserve. It serves no public interest. It tends, because of a disproportionate division to the initiating carrier, to poor service by the continuing carrier and to indifference by both to the interests of the shipper. It has long been recognized as a traffic evil. On its elimination we cannot predicate guilt.

(*b*) It is clear, too, that an agreement to divide traffic would, as a [323] general proposition, have some tendency to prevent competition in rates; that is, the Hocking would not be so likely to name its lowest rate from the Ohio to the lake as if it was not sure of half the traffic any way, and so the through rate from the Kanawha district to the lake might not fall to the point where it would be brought by full competition.[10] This is, I think, as strongly as this feature can be stated. It is, of course, now perfectly well settled that free competition is the policy of the law, and it is none of our concern whether this is, as to railroads, the best economic policy; but, when we are trying to decide whether we

[10] The actual effect of the (theoretical) rate sustaining interrelationship is minimized by the fact that coal rates go by districts, and a change in one district would affect all th[illegible] note 2.)

Denison, J., dissenting.

are compelled to find a dominating intent to restrict trade merely because one inducement to compete in rates is removed, we cannot shut our eyes to the small part which rate competition now plays. These contracting parties knew, in 1910, as we all now know perfectly well, that under the thorough and efficient administration of the Interstate Commerce Law rate cutting, as a means of getting business, either from shippers or from connecting lines, has ceased. All rates, through as well as local, must be published, and cannot be cut until after 30 days' notice. A published cut is reasonably sure to be met by all who are competing without a differential. No contract for traffic in consideration of a cut can be made, and, as cutting rates will not get business away from a competitor, rates are not voluntarily cut. I do not mean to say that this disappearance of rate cutting makes lawful a contract to maintain rates—not at all—but it does affect and minimize the evidential importance of a contract, removing one inducement to cut rates, when we are determining the character of the entire transaction of which that removal is only one element.[11]

(c) Coming to competition in service, it is not to be denied that such a traffic-dividing agreement as here exists tends to discourage this kind of competition, and that there is here, in theory, some degree of restraint, more likely to have actual effect than is the restraint as to rates.[12]

[11] In the same way, when some tendency to maintain high rates is only an incident of the contract under attack, we may well remember that the shippers' meritorious grievance on this point is the maintenance of an unreasonable rate, and for that he has an effective remedy.

[12] While each road is content with half the Kanawha traffic, and the Kanawha has the power to equalize, the agreement to divide tends to make both Ohio roads careless as to good service. Now that the shipper has the absolute right of through routing, the Kanawha's power to equalize rests solely on its relations to the Sunday Creek mines, which originate a considerable part of the tonnage, available as an equalizing medium, so that here, too, the Sunday Creek ownership is the real evil. With this removed, the agreement to divide the Kanawha traffic becomes comparatively [i]neffective, and the shippers' right of through routing must bring freight solicitors to them in competition.

We find, then, both as to rates and service, some impediment to ideally free competition; but that ideal is rare, if it exists at all. We must have a practical standard of comparison. That standard must be [324] the lawful situation which would exist, except for the agreement said to be forbidden. This lawful situation is usually that which was displaced by the agreement under attack; but in this case the next earlier situation was itself unlawful, and to get on solid ground we must go back to 1899. The theoretically perfect remedy would be to restore the condition existing in 1899. The bill of complaint and the logic of the situation lead there and lead us nowhere else. When we get there, we find that the Central practically owned the Kanawha. For 10 years it had been the majority stockholder, and it was in absolute control. For the Kanawha traffic, the Kanawha and the Central formed one through unitary line from the mines to the lake. The Hocking could not compete for part of the haul, and, so far as concerns any benefit to the Kanawha shippers, the Hocking might as well have been out of existence.[13] As compared with this situation, I cannot doubt that the present arrangement is an aid, not a restraint, to competition.

This was in 1899. If we ought to look for a standard of comparison in 1910, that standard must be such other lawful arrangement as might naturally have resulted in the course of separating the two Ohio roads, if the contract for joint control of the Kanawha had not been made. This other arrangement would almost certainly have been the purchase of the Kanawha by or for either the Hocking or the Central exclusively in its own interest. The Kanawha had always been operated in connection with one or the other or both of these roads. It had little reason for existence, except as an extension of one or both of these roads. Except in coöperation with them, it could not get its coal to market. It is not impossible that a wholly independent purchaser for the Kanawha might have been found, but that

[13] There was then (in 1899) no way of compelling the Kan[illegible] join the Hocking in a through route or joint rate; nor [illegible] indeed, in 1910. (See note 14.)

there should be an independent purchaser who did not plan to resell to one of the other through lines, and who would pay anything like the price which the road was worth to either one of the Ohio lines as an extension, is highly improbable. Suppose, then, that it had been purchased in 1910 by or for the Central (and the Government concedes this would have been lawful), it follows that all the Kanawha traffic would have gone through Ohio over the Central so far as the Kanawha and the Central, acting directly or indirectly, could have brought about this result. So long as a satisfactory through route was provided by the Kanawha-Central line, the Kanawha could not have been compelled to establish a through route or rate by way of the Hocking, and the Hocking could not have competed at all.[14] Even if the Kanawha could have been compelled to establish **[325]** a through route and rate via the Hocking the same as via the Central, the Kanawha-

[14] In March, 1910, the commission could direct two roads to join in a through rate and route only, "provided no reasonable or satisfactory through route exists." 34 S. L. 590. It seems clear that the Kanawha-Central route would have been made and kept a "reasonable and satisfactory through route" so that the power to compel the Kanawha to join with the Hocking never would have arisen. In June, 1910, this proviso was cut out, but its place was taken by the provision (36 S. L. 552): "And in establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." This is awkwardly expressed, because of the lack of definite antecedent for "to do so"; but it seems to mean that if the condition in 1909 was restored and if the Hocking demanded from the Kanawha a joint through route, via either Athens or the river division, the Kanawha could not be required to comply, because such route would embrace substantially less than the entire length of the Kanawha to Corning, and less than the entire route between its termini, the Kanawha district and Toledo, over railroads "operat[illegible] conjunction and under a common management and [illegible] Hocking solicitors, in the Kanawha district, wou[illegible]

Central could have made the part of the rate south of the Ohio River so high, and the part north of the river so low, that the Hocking could not make a competing local rate; or, even if this trouble was overcome, there would still remain the numerous practical obstacles which the Kanawha-Central management could oppose to a diversion of part of its through traffic. In any of these events, the Kanawha shippers would have no remedy from the law or from the Interstate Commerce Commission, excepting to compel a reasonable through rate; and that remedy has never been impaired.

These considerations lead me directly to the conclusion that the Kanawha-Hocking-Central relationship now attacked produced (inherently) for the Kanawha district shippers less monopoly and more competition and better service than would have followed from either of the alternative arrangements which would naturally have resulted in 1910, if this one had not been made. The other would have been concededly lawful. I cannot find unlawful monopoly, resulting from inherent power to restrain competition, where that power is less than it would be in the lawful alternative situations.

8. If the intent unlawfully to monopolize or restrain may not be inferred merely from the existence of the power, where that power is of the limited extent and of the peculiar nature which have been described, is that intent otherwise proved by this record?

The five trunk lines had been engaged in an unlawful combination and had been directed by the Ohio Supreme Court to dissolve such combination. It is their purported dissolution which is now under review. Where the only question is whether the defendants are in bad faith continuing a violation of the law after having pretended to quit, it seems to me reasoning in a circle to draw, from their former misconduct, any serious inference of their present bad faith.

If the Chesapeake & Ohio and the Lake Shore had purchased the Kanawha stock with no interest in the subject matter except to control its traffic for
Central, the question would be di

the sole interest of either purchaser. The Chesapeake & Ohio desired an outlet to Lake Erie for all of its own great [826]traffic.[15] For this purpose, it desired to buy the Hocking. This purpose and this desire were beyond criticism; but to reach Gallipolis, the nearest point on the Hocking, it must build across the Ohio River and over 30 miles of difficult country, and it must then, for its traffic, either practically rebuild the Hocking River division, 75 miles, to Logan, or build, new, 50 miles, to Athens, in order, one way or the other, to reach the modernized lines of the Hocking. Why should it be required to do this, paralleling the Kanawha, when it could buy such an interest in the Kanawha as secured to it the indefeasible right to use the Kanawha as this connecting link? What rule of public policy required it to build this new road instead of buying the existing road?

Turning to the Lake Shore, we find that it desired to buy the Central for the purpose of reaching the coal fields and getting both coal traffic and fuel coal for itself and its allied New York Central lines, and to make connections for through traffic both ways, with the Coal & Coke and the Western Maryland roads. These were rightful and legitimate objects, also beyond criticism. So was its desire to have this feeder reach the Kanawha district. Apparently no one questions that it could rightfully have purchased the Kanawha outright, nor is there, to my mind, any reason for ascribing to the Lake Shore any moving purpose in the whole transaction of March except that just mentioned.

We find, then, that the Chesapeake & Ohio had the legal right to buy the Kanawha and a strong and lawful motive for so doing, and that the Lake Shore had the same right

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[15] That this was real, not pretended, is shown by what happened. In 1909, the first full year before the change, the C. & O. delivered to the Kanawha for hauling over its line 4,000 tons of coal and coke and 70,000 tons of other freight. In 1911, the first full year after the change, it so delivered 811,000 tons of coal and coke and 168,000 tons of other freight. Between the same periods, southeasterly bound freight received by the C. & O. from the Kanawha increased from 122,000 tons to 190,000 tons. This enormous tonnage given by the C. & O. to the Kanawha was not merely diverted from the other connections of the C. & O., because there was no decrease in the tonnage given to these other connections.

and an equally strong and lawful motive, and that this underlying and justifying motive by each had nothing to do with the thought of suppressing competition between the Hocking and the Central; yet the Lake Shore knew that, if the Chesapeake & Ohio made the purchase, the Lake Shore would be defeated in its plan of reaching the Kanawha fields, and the Lake Shore's subsidiary, the Central, would get no Kanawha traffic which the Kanawha could divert; and the Chesapeake & Ohio knew that, if the Lake Shore made the purchase, not only would the former's subsidiary, the Hocking, get little through traffic, but the whole scheme for the Chesapeake & Ohio outlet to the lake would be defeated. Under these circumstances, what more natural than that they should join in buying the Kanawha, each secure against exclusion by the other, and what primary or characterizing unlawful purpose can be found in such a joint purchase? If this joint purchase was, for these reasons, rightful and lawful, as I believe it was, the arrangement for dividing between [327] the Central and the Hocking the traffic originating on the Kanawha, though important in itself, becomes relatively a mere incident of the main transaction, and its real purpose was to prevent a monopoly of this traffic by either purchaser. It makes little difference how express the equal division agreement was. Such an agreement would be implied from such a situation. Nothing else would be fair or right. If a receiver should be appointed for the Kanawha, the court would direct him to do just what this division agreement called for and what these parties have been doing, viz, divide this traffic equally between the two Ohio lines, so far as he could do so and so far as they were equal in their furnishing of cars and other facilities; in other words, "to treat them fairly."

9. The remaining element of the assumed general criterion is the amount of restraint, actual or potential, which did take place.[16] Here, again, we find that the natural symp-

[16] The Kanawha traffic to be divided was about twenty-five per cent of the total traffic of the two Ohio roads. This appears only as to the Hocking; I assume a similar ratio on the Central. I reach this result by taking the figures for 1911 (Ex. 138) and excluding the south-bound tonnage from the total of [illegible] nd excluding the C. & O. tonnage from total Kanawha [illegible].

toms of a suppression of competition did not exist. No one complains of any suppression or of any practices resulting therefrom; and this for the very good reason that there never was any competition to suppress. It is difficult to prove that defendants have put a burden upon a thing which never existed. Not only is the record barren of any suggestion that the Kanawha shippers ever had the benefit of any competition between the Central and the Hocking, but it affirmatively shows that during the 10 years before 1910 competition was impossible, because the Hocking controlled everything; and that before 1900 it was impossible, because the Kanawha belonged to the Central.

It is certain, then, that the result which will condemn the agreement must be found in the suppression of "potential" competition, and we must ascertain what this means. In the Union Pacific case the thought was applied with reference to undeveloped traffic from territories already reached by the two roads, and which traffic might grow into larger volume; but the same idea must extend to new and likely methods of competition and even, in some instances, to the building of new roads or branches to make competitive territory out of that which has been tributary to one road only. Whether competition, between the roads now existing, in cutting rates, etc., is probable enough or would be serious enough under the facts of this case to be that potential competition which must be preserved, has been discussed. It is still possible that the Ohio road which saw the Kanawha sold away from it would have built a new line to the Kanawha district even in spite of the great topographical difficulties. Such new road apparently could not have reached any mines now on the Kanawha, because there is room for no new track along the river next to these mines; but, treating the district and not the individual mines as the shipping unit, it could have reached other parts and developed new mines. That [328] it would have done so is, however, the merest surmise. It is not even probable, so far as the record informs us; and I cannot condemn the joint Kanawha purchase because it has possibly prevented the building of another line in some unknown location at some vague future time. An arrangement which removes the motive for build-

ing a competing line cannot, for that reason alone, amount to an unlawful forestalling of potential competition, unless such forestalling was a substantial and moving purpose of the arrangement, and unless the building of such other line was at least reasonably probable—indeed, the latter condition covers both, because it could not be the main and sufficient motive, unless the new road was foreseen as probable.

Finally, in testing the actual results, we must look to the Kanawha shippers. All this controversy is to protect their interests—and, of course, the correlative interests of the public which buys from them. Have the shippers been injured? Are their rights in jeopardy? On one hand, it appears that there is somewhat less of motive on the part of the Central and the Hocking to compete on a part of the through haul than there would be under certain other circumstances which never did exist, which would not have been a probable alternative, but which perhaps might have come into existence. I find nothing else to put on this side of the scale. On the other hand, it appears that the great trouble in coal shipments is to get cars, and that the Kanawha, even when in combination with the Central and the Hocking, was poorly supplied with cars and served its shippers poorly. It was greatly interested in its own coal companies, and it would have supplied them if it could, even if it did not impartially distribute all the cars it could get. Under these conditions, coal shipments from the mines along the Kanawha amounted, in the last six months of 1909, to 36,000 cars. With the transfers in March, 1910, there came a new outlet to all the western C. & O. territory, and direct and close relations which made it to the interests of these two trunk lines to furnish cars to the Kanawha.[17] It seemingly must have been due, at least in a large part, to these greater facilities that the shipments by the mines along the Kanawha had in-

[17] Up to July, 1909, the Hocking, Central, and Kanawha cars were pooled and used interchangeably on these roads. During the nine months intermediate the end of this pooling arrangement and May 1, 1910, the date of full effect of the March contracts, the Central furnished to the Kanawha an average of 266 cars per month. During the same months of 1910 and 1911 it so furnished an average of 1,466 per month.

creased in the last six months of 1911 to 42,000 cars. This does not seem to indicate a substantial restraint of trade and commerce. It seems to me clear that the Kanawha shippers and their dependent public have been benefited by the transaction of March, 1910, taken as a whole, and that interstate trade and commerce have been promoted thereby; [18] while the only restraint affecting such shippers or such commerce is theoretical rather than actual, and such as [329] it is, arises out of a natural, if not necessary, incident of the main transaction.

10. There remain for consideration two further suggestions. It is said that the Hocking and the Kanawha are competing roads, and hence that the former cannot take part in managing the latter, either directly or through the instrumentality of the Hocking's chief stockholder. I am not satisfied that these two roads are in any fair sense competing. That portion of the Kanawha extending from Hobson north 40 miles to Corning, and that portion of the Hocking extending from Logan south 50 miles to the river, are substantially parallel and 20 miles apart. There is some traffic to and from two or three small towns, Pomeroy, Middleport and Gallipolis, but the Kanawha does not reach these towns with its own track and runs to them over the Hocking under a trackage contract which does not permit it to compete with the Hocking, except by the latter's sufferance. A small amount of coal is produced at some mines along the southern part of the Hocking river division. The Kanawha might, by building its own spurs and branches, reach these three towns and these mines, but the whole of the traffic so reachable and as to which, theoretically, there might be competition, is negligible both in percentages and in total volume; neither is any reason shown to anticipate increase.

The relative positions of the Hocking and the Kanawha are not those of parallel and competing roads, but those

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[18] In 1909 the New York Central lines were furnishing 1,600 cars per month to the Central; in 1911, 8,300 cars per month. Coal production at the mines on the Central increased 500,000 tons for 1911 over 1909.

Denison, J., dissenting.

of connecting and continuing roads having an end overlap. It is, in principle, though not in degree, as if the New York Central ran from the east to Niagara Falls through Buffalo, and the Michigan Central, from the west, to Buffalo, through Niagara Falls. Here would be from Buffalo to Niagara Falls two parallel roads, and they might compete for the freight originating at those and intermediate points. This could hardly be thought sufficient to deprive these two roads of their substantially connecting, rather than competing, character. So here one looking at the map must, I think, observe that the Hocking and the Kanawha form substantially a connecting and continuing line from Gauley Bridge to Lake Erie, and do not lose this character because a branch or spur of the Hocking Toledo-Athens main line branches off at Logan, parallels the north end of the Kanawha and strikes it at Kanauga.

It is true the Ohio court made a finding that these roads were parallel and competing, but the court was considering that portion of the Kanawha north of the river, and not, as we must do, the entire road; and also was treating the Kanawha as part of one system with the Central, a thing which we now cannot do. That court was also considering intrastate commerce, as to which the conclusion of fact might well be different from the proper conclusion regarding the immense volume of traffic involved under this record.

11. It is also said that the C. & O. and Kanawha are competing roads, and hence the former cannot take part in the management of the latter. The roads are parallel from Gauley Bridge to Charleston, a distance of 30 miles along opposite sides of the Kanawha River. The mines on one side ship over the Kanawha; on the other side, over the C. & O. On neither side can they practically reach the other rail[330]road. The cost of crossing the river would be prohibitive. On neither side could another railroad track be built, the river valley being, at many places, a mere gorge. From Charleston to the Ohio River the courses are generally divergent, one tending north, the other west. Charleston is a common point, and there should be, at this

point, competition for freight originating at Charleston or coming in over the Coal & Coke Railroad and destined for the Northwest. The interest of the C. & O. in the Kanawha would theoretically tend to restrict this competition, though the tendency would be imperfect, because over its own lines the C. & O. would get the entire haul to Chicago, while the other way it would be interested in half the profit on the haul from Charleston to Armitage, and half of the volume of the traffic from Armitage to Toledo. One common point, with the amount of traffic existing at Charleston, would, in any event, be hardly sufficient to give a competing character to these railroads, but, even if the theoretical but imperfect tendency to limit this competition could ever sufficiently invalidate an interest by one in the other, yet, in this case, such tendency must yield to the undisputed testimony, which is that the competition at Charleston between the soliciting agents has continued active and vigorous since March, 1910, as before.

The map also suggests that control of the Kanawha might be used to block the making of a through line from the seaboard to the lakes, by way of the Virginian, the Kanawha, and the Central, which through line would, as a whole, compete with the C. & O. It is sufficient to say of this suggestion that no such issue is suggested by any pleading, and that the Lake Shore, in purchasing its interest in the Kanawha, guarded against interference by the C. & O. with such possible future plan.[19]

Upon the whole case I see two great shipping districts with interests involved—the Hocking coal district and the Kanawha coal district. The Hocking shippers *were* subject to a monopolistic combination of all transportation facilities. They *now* have these facilities divided between two trunk

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[19] Indeed, the entire subject matter of this numbered paragraph should be disregarded for the same reason. Paragraph 20 of the bill limits the issue to the charge of a continued combination between the Hocking, the Central, the Zanesville, and the Kanawha. It is important to know what the C. & O., as owner of the Kanawha, is doing with the Kanawha; but, to the issue tendered and made, it is immaterial whether the C. & O. is under disability to become the owner of the Kanawha.

lines, wholly independent of each other, as to competition between which there exists no obstacle which a court can remove. The Kanawha shippers *were always* subject to that monopoly which results from having only one railroad outlet. This has been neither increased nor diminished, but by the alliance between their railroad outlet and two strong lines the shippers can reach much new territory, and the outlet has its facilities and usefulness much increased. As to the one feature (joint Kanawha control), in which the position of the shippers might be better, we are asked, it seems to me, to *create* competition.

O'HALLORAN ET AL. v. AMERICAN SEA GREEN SLATE CO. ET AL.[a]

(District Court, N. D. New York. August 22, 1913.)

[207 Fed. Rep. 187.]

MONOPOLIES (§ 12)—COMBINATION OF PRODUCERS—RESTRAINT OF TRADE—"MONOPOLY."—Within Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), declaring illegal every combination in restraint of trade or commerce among the several States, is a combination by most of the previously independent producers of "Sea Green" slate, having a quality and demand peculiar to itself, whereby the power to determine the amount of its production by each, its prices, and the persons to and by whom sales shall be made, is placed in a central body, though it is more or less in competition with black slate, and though such power may not have been unduly exercised to raise prices.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

[188] Action by James O'Halloran and another, partners as O'Halloran & Jacobs, against the American Sea Green Slate Company and others, to recover damages, to be trebled under the provisions of the statute, for an alleged violation of the provisions of the act of Congress approved July 2,

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[a] For opinion of Circuit Court of Appeals reversing the finding of the District Court (229 Fed. 77) see [illegible]

[b] Syllabus copyrighted, 1913 [illegible] pany.

1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Decision for plaintiffs.

Randall J. Le Bœuf, of Albany, N. Y., and *James G. Marks*, of Pittsburgh, Pa., for plaintiffs.

Lewis E. Carr, of Albany, N. Y., *S. E. Everts* and *J. B. McCormick*, both of Granville, N. Y., and *F. L. Taft*, of Cleveland, Ohio, for defendants.

RAY, District Judge.

Having in view the salient and controlling facts in this case, nearly all of which are undisputed, and the more recent decisions of the Supreme Court of United States, I am forced to the conclusion that the defendants, except as mentioned in the findings, have violated the statute above referred to, the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to the damage of the plaintiffs, and that the plaintiffs have shown that they have sustained some damage, and that under the stipulation the court should proceed to take proof of such damages.

The defendants have filed many requests to find, which I do not pass upon, except as the findings made determine them, but reserve the right to pass on them before final judgment, and when the defendants shall have determined what additional facts they regard essential to have determined or passed upon specifically. The findings made and filed herewith, and made a part hereof, show, I think, that prior to August, 1904, the producing defendants were engaged in business in the production and sale of "sea green" slate in competition with each other and all other producers of "sea green" slate in the United States; the producing area of such slate being confined to a narrow strip of territory along the western boundary of the State of Vermont and near the eastern boundary of the State of New York. Slate of other colors and qualities were and are produced in Maine, Pennsylvania, and elsewhere, and, of course, there was more or less competition between these other slates and "sea green" slate; but the sea green had a limited

area of production of its own, a limited number of actual producers, and a market and demand of its own. It was not difficult to form a combination by and through which, not only the production and output of "sea green slate" should be limited or enlarged or controlled at will, but by and through which the dealers therein could or should be limited in number, and the price of sea green slate fixed and determined by the combination. This was done by and through the formation of the American Sea Green Slate Company, a New York corporation, and the agreements and combination made between it and nearly all the producing companies, corporations, and individuals.

[189] As these companies, corporations, and individuals had been doing an interstate business, the result was an interference with, a restraint upon, and a limitation of interstate commerce in sea green slate. Free competition between the producer and sellers in the production and sale of sea green slate as it had theretofore existed was destroyed, or substantially so, as nearly all producers came into the combination. As a matter of fact production was controlled, as well as sales and prices were fixed, not entirely and completely, but substantially so, and interstate trade in sea green slate was in fact restricted and interfered with. It seems to me that when the producing defendants, theretofore engaged in producing and selling sea green slate and controlling substantially the entire production, agreed to form and did form this so-called selling corporation, the American Sea Green Slate Company, and placed in its hands the powers mentioned, and which were exercised, making themselves subject to its will and control in producing and selling, they "combined"; and when we find that the object of the combination was to control and at will restrict trade and commerce in sea green slate among the several States and control the price at which it should be sold, and the persons to whom sold, and the persons by whom it should be sold, it must be held that the combination was illegal, under the provisions of section 1 of the act referred to, which says:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

I acquit the defendants of any willful purpose or conscious design to violate this act; but this is no defense, if the agreements made and their execution necessarily operate to unduly and unreasonably restrain trade or commerce among the several States. See *Addyston Pipe case*, 175 U. S. 211, 214, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. So far as the intent of the defendants is involved, they are presumed to have intended the necessary, natural, and known effects or consequences of their agreements and acts, and if these effects or consequences be to unduly restrain interstate trade and commerce, then the combination is illegal, and the participants are chargeable with the consequences, and are liable for the damages resulting. See also *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, and *Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815.

In *United States* v. *Union Pacific R. R. Co., et al.*, 226 U. S. 61, 85, 22 Sup. Ct. 53, 57 (57 L. Ed. 124), the court said:

"We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is uduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable."

[190] See *Swift & Co.* v. *United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

In the case at bar we find a combination which places several producing and selling persons, corporations, and companies engaged in interstate commerce in such a relation to each other as to create a single dominating control in one corporation, the American Sea Green Slate Company, whereby the natural and theretofore existing competition in producing and selling Sea Green slate in interstate commerce is unduly restricted. The contention for a long time made,

and still continued by many, that any agreement which to any extent and in any degree whatever affects or restricts and limits interstate commerce is illegal, is not supported by the recent decisions of the Supreme Court, and it seems to be settled that there must be an undue restriction or restraint, the question of fact to be settled by the court applying the rule of reason. But the legality or illegality of a combination is not to be determined by weighing or balancing the benefits to the combining parties as against the injury to the public or public interests, or by weighing and balancing the possible benefits to the public interests as against the injury to such interests. So an honest intention on the part of the combining parties to benefit the general public, by cheapening the cost to the consumer of the article produced and sold, and giving him a better article, will not save from the condemnation of this statute a combination which restrains and restricts interstate trade and commerce in that article to any considerable degree, and places the power to control production and fix prices in the hands of a dominating corporation or of the combination itself. To so construe this act would make injurious effects on the general public, and not interference with and restrictions or restraints upon interstate commerce, the essence of the offending.

And it is equally true that an intent and purpose to aid the financially weak producer as against the strong, to some extent, as here, will not save the combination from the condemnation of the statute, if that be not the main and controlling purpose and result, but interference with and control of production and prices in interstate commerce be such purpose or the result. While those engaged in the production of an article and interstate commerce therein have the right in all lawful ways to protect and foster their industry, they are not permitted to go to the extent of combining to unreasonably fetter or restrict interstate commerce. It has been declared that agreements or combinations between dealers having for their *sole* purpose the destruction of competition and the fixing of prices are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from

the enhanced price to the consumer. This is but a polite way of declaring that combinations by dealers to loot the public for their own gain and benefit are illegal. Each and every individual or corporation engaged in the production or sale of an article may, of course, fix the terms on which he will sell, provided he violates no law in so doing, for here the door to honest competition is left wide open, so that the public may protect itself; but when all, or substantially all, producers and dealers com[**191**]bine to fix prices and control sales, as well as production, the interests of the public are at once threatened, and necessarily injured.

Men may combine their money, their intelligence, and their industry or effort for their common good, and so corporations are permitted and copartnerships are lawful; but when those theretofore engaged independently in producing and selling an article combine their money, intelligence, and effort for the purpose of limiting the supply and controlling the price of such article, and destroying competition, and they interfere with interstate commerce, or their combination is such as in its operation and execution will bring about these results, they have become violators of the statute referred to, regardless of intent. The Supreme Court has declared that the act referred to—

"prohibits any combination whatever to secure action which necessarily obstructs the free flow of commerce between the States, or restricts in that regard the liberty of any individual to engage in business." *Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815.

The power under and pursuant to the combination to do the prohibited things is what brands it (the combination) as illegal, not the actual exercise of that power, although when a plaintiff sues for damages he must, of course, show the combination, its operation, and that it has resulted in damages to him. And of course, to bring a combination of this character within the condemnation of the statute, it is not necessary to show that a complete and United States wide monopoly has been actually created, or that the entire trade or business and production of an article has been brought within the control of the combination, or ever will be. It is no defense for such a combination to show that

there is still some competition and some competitors, and that the acts of the combination do not wholly and entirely control interstate commerce in the article, or absolutely fetter it. If the combination be one in restraint of trade or commerce among the several States to any substantial degree, it is within the condemnation of the statute.

The defendants, except Sheldon Slate Company, which came in later, and one other, had negotiations which led up to the organization of the American Sea Green Slate Company, the purpose of which is stated in the findings, where the articles of incorporation are also set out. The defendants contend in effect that the competition between them was very injurious and well-nigh ruinous. It was understood and agreed that each of the producing companies, corporations, and individuals should sell the whole of his or its production of sea green slate to this selling corporation, when formed. And it was the purpose that this selling corporation should fix the price of all the slate produced by those who went into the arrangement, whether actually turned over to it or not. It is not a case where the producers in the combination independently fixed their own prices for the same quality of slate at their own free will, or retained the power to fix and control the price to purchasers and consumers, and they were not even left free to fix and determine their own productions. If they did exercise these powers, it was at their peril. In the selling corporation formed, each producer had a representative, and contracts were [192] executed and renewed by which they transferred to such corporation, not only their stock on hand, but all to be produced by them, and that in any manner thereafter acquired. It was also a part of the combination agreement that the stock of the corporation could only be sold to others after it had been offered to and refused by this corporation itself. All their slate from 1904 down to the trial was transferred to this selling corporation. There was a contract made and signed by the president of the corporation, and this resulted in the Cuyahoga Roofing Company, an exclusive selling agency for certain territory; and representatives of all the producing companies signed the contract. A resolu[illegible]ed by this corporation for-

bidding the producers to move slate except on its written order, and the destination of the slate and the consignee must be given also.

Here are some of the things which this joint action of the defendants accomplished: By the exclusive ownership of their product the American Sea Green Slate Company had power, which it exercised, aside from price making, to restrain or destroy at will the competition in interstate commerce which had theretofore existed between them. It determined the persons to whom the slate produced by them should be sold, the classification of such persons, and authorized the entire exclusion of any of such persons. It also determined the quarries from which the producers' slate should be sold, and whether any should be sold, or whether it should be stored to serve the purposes of those in the combination; the terms and conditions of sale; and the piling and loading, etc., as directed by certain inspectors. There are many others which I will not recite. This combination centered its powers in this selling corporation, transferred to it all its slate, that of each producer, gave it control of prices, sale, shipment, and actually forbade the producers to move slate on their own account, except on conditions fixed by it. It is true that on certain conditions producers were permitted to repurchase and sell; but they were not free to sell or ship in interstate commerce the slate so repurchased, as the terms and conditions were prescribed by this selling corporation.

The learned attorney for the American Sea Green Slate Company ably contends that:

"There is a distinction between combination and agreements that were entered into with the legitimate purpose of reasonably forwarding personal interest and developing trade, and those that give rise to the inference or presumption they had been entered into with intent to do wrong to the general public."

There should be added to this quotation:

"And to limit the right of individuals, thus restraining the free flow of commerce, and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

Opinion of the Court.

The learned counsel says the first class mentioned are legal, the latter class illegal, and—

"what was done was to better producing conditions, to so aid producers they could successfully continue and increase their operations, without unduly or unreasonably increasing the cost to the consumer. What was so intended has been accomplished, the producers have been benefited, but that expense has not been at the expense of the consuming public."

[193] He also argues that in point of fact, since the organization of this selling corporation, the output and sale of sea green slate has increased, and that the case is devoid of evidence tending to show that the free flow of interstate commerce has been at all interfered with.

I think a combination or an agreement is within the condemnation of the act which places the power in the hands of a controlling or selling company to fix the prices to consumers and dealers of the commodity produced by those in the combination, and who had theretofore been competitors, and to sell or not to sell at all such production, and also fix or determine the class or classes of persons who shall be permitted to purchase and sell or deal in such commodity. The exercise of such a power would clearly interfere with and restrict the "free flow of interstate commerce." The article, as here, sea green slate, over 60 per cent being in the hands of this selling corporation, could be for an indefinite period entirely, to that extent, withdrawn from the channels of trade. The supply to dealers and consumers in one or more sections of the country may be cut off or greatly limited. Is it a defense to those in such a combination to say that, true, we restrict and interfere with interstate commerce between New York and Boston and Providence and Portland; but we have largely increased such commerce in this article between New York and Cleveland and Chicago and Omaha and San Francisco, and, altogether, we have increased the interstate shipments of this article fourfold; true, we cut off South Carolina, Georgia, and Florida, and the South altogether, but we sell the entire product, which we have largely increased, in Ohio, Michigan, and the great West, and have the [illegible]eased interstate trade and commerce in this [illegible]l? I do not so understand the law.

Opinion of the Court.

It is also contended that no harm has been done by way of increasing the price of sea green slate to the consumer, inasmuch as the evidence discloses that such increases of price as have been made do not meet or more than meet the increased cost of production. Also:

"Sea green slate is in competition in the markets with black slate, the production of the Pennsylvania region. The production there largely exceeds that of sea green. The prices of the sea green to the producers are limited to the prices of the black slate in the contracts previously referred to. The prices of the sea green to consumers are necessarily limited to and regulated by those of the black slate, which so largely predominates in the markets. So it is not in the power of the Sea Green Slate Company to impose upon consumers any unreasonable burden in the way of price."

But, aside from the question of damages, if any, suffered by the plaintiffs, is it of consequence, in determining the illegality of this combination, whether or not the increase in price actually made was to meet the increased cost of production or to satisfy the alleged greed of those in the combination? Is a combination of this class any the less illegal for the reason it has not put in actual practice or operation the powers it has conferred upon itself by the joint action of its members? It is unquestionably true that sea green slate has met and meets and will meet in competition black slate from Pennsylvania and Maine and other places, and also a variety of other roofing materials, and that such competition will more or less affect and have to do with determining the price at which the sea green slate must be [194] sold. This may have to do with the question of damages; but as it appears that sea green slate has a quality and a demand peculiar to itself, I am unable to see that the supply of black slate has much, if anything, to do with determining the legality or illegality of this combination. Is trade or commerce in *this* article among the several States restrained unreasonably, or may or will it be so restrained, by the operations of this combination is the crucial inquiry?

Section 7 of the act provides:

"Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or

declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

It is quite true that before these plaintiffs can recover it must appear that:

"The acts of the defendant complained of must be forbidden by or be unlawful under the act, and (2) the plaintiffs must have been injured in their business by such forbidden or unlawful act."

I am now, under the stipulation, to pass on the illegality of the combination only, and whether or not the plaintiffs sustain such a relation to its acts as make a prima facie case of injury to some extent, even though it be nominal merely. The plaintiffs were and are large dealers in slate of various kinds, and in sea green slate, with others. Since the formation of this combination they have been compelled to pay more for this slate, they claim, and have been placed under restrictions not before in existence, and denied slate, they claim, because of this combination and its illegal character. The question of damages was not gone into, and I express no opinion, as I have none, whether or not the plaintiffs in fact have been substantially injured in their business or property by the acts of the defendants or either of them. The evidence is sufficient to show a prima facie case for some damage.

As I cannot hold this combination to be one not in violation of section 1 of the act, and feel compelled to hold it is one condemned by the act, the parties will proceed to present their proofs on the question of damages. As before stated, inasmuch as no judgment can be entered until this question of damages is settled, I reserve the right to pass on defendants' requests, as well as additional requests of the plaintiffs, if any, at the time of final decision. It is useless to lumber a case with a mass of unnecessary and immaterial findings; but defendants should have the privilege of presenting requests in view of the findings already made.

So ordered.

Syllabus.

AMERICAN SEA GREEN SLATE CO. ET AL. *v.* O'HALLORAN ET AL.[a]

(Circuit Court of Appeals, Second Circuit. December 14, 1915.)

[229 Fed. Rep., 77.]

MONOPOLIES 17—SALES OF GOODS—APPOINTING EXCLUSIVE AGENT.—If a corporation organized by producers of slate, and to which they sold their output, was not a combination obnoxious to Sherman Act July 2, 1890, c. 647, 26 Stat. 209, the appointment by it of an exclusive selling agent was not unlawful.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 28—REMEDIES OF PERSONS INJURED—DAMAGES RECOVERABLE.—If a corporation organized by producers of slate was an unlawful combination, damages directly caused by reason of its appointment of an exclusive selling agent were recoverable as other damages, under Sherman Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), providing that any person injured in his business or property by any act forbidden or declared to be unlawful thereby may recover threefold the damages sustained.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

MONOPOLIES 28—REMEDIES OF PERSONS INJURED—DAMAGES RECOVERABLE.—To recover damages under Sherman Act, § 7, plaintiffs must show that as a result of defendant's acts actual damages susceptible of expression in figures were sustained, and they must not be speculative, remote, or uncertain.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

MONOPOLIES 28—ACTIONS FOR DAMAGES—EVIDENCE.—In an action for damages under Sherman Act, § 7, the damages must be proved by facts from which their existence is logically and legally inferable, and not by conjectures or estimates.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

MONOPOLIES 28—ACTIONS FOR DAMAGES—EVIDENCE.—The producers of a particular kind of slate organized a corporation and sold all of their output to it at 10 per cent discount from its list prices. The corporation sold to wholesalers, including plaintiffs. A number of persons in the roofing business in Cleveland, some of whom had been plaintiffs' customers, organized a roofing company, and

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[a] For opinion of District Court (207 Fed. 187), see *ante*, p. 294.

[b] Syllabus copyrighted, 1916, by West Publishing Company.

Statement of the Case.

such company was constituted the exclusive selling agent of the slate company in Cleveland. *Held* that, in an action by plaintiffs under Sherman Act, § 7, plaintiffs could not recover damages caused by the fact that they were compelled to buy at a price higher than the market value, where there was no evidence of market value, except evidence as to the price at which the producers sold to the slate company, as this company bought each producer's whole product, including sizes slow of sale, as well as sizes largely desired, and it was not fair to assume that, had there been no combination, plaintiffs could have bought from the producers at the price at which they sold to the company.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

[78] MONOPOLIES 28—ACTIONS FOR DAMAGES—EVIDENCE.—Damages for the loss of the business of former customers of plaintiffs, who became members of the roofing company, could not be recovered on the supposition that they would have continued to buy as much as in previous years, where there was no evidence to support this supposition, and there was not even evidence that such former customers obtained any slate at all of the kind in question.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

MONOPOLIES 28—ACTIONS FOR DAMAGES—EVIDENCE.—Damages could not be recovered for the loss of the business of the customers who ceased buying from plaintiffs and became members of the roofing company, unless plaintiffs showed that the change was made because of the unlawful combination, since this could not be inferred from the fact that the change was made.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

In error to the District Court of the United States for the Northern District of New York.

Action by James O'Halloran and another against the American Sea Green Slate Company and others. Judgment for plaintiffs, and defendants bring error. Reversed.

This cause comes here upon writ of error to review a judgment in favor of defendants in error who were plaintiffs below. The action was brought to recover treble damages under section 7 of the act of Congress of July 2, 1890, the Sherman Anti-Trust Act. By stipulation of the parties the cause was tried by the court without a jury; findings of fact and conclusions of law were filed, to some of which exceptions were taken. The opinion of the district judge will be found in 207 Fed. 187.

Lewis E. Carr, of Albany, N. Y. (*Walter C. Noyes*, of New York City, and *J. B. McCormick*, of Granville, N. Y., of counsel), for plaintiffs in error.

Randall J. Le Boeuf, of Albany, N. Y., for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge.

The opinion of Judge Ray sets forth the facts very fully. As it may readily be consulted, a very brief statement of the issues is all that need be made here. Sea-green slate is produced in a small section located in the State of Vermont. Prior to 1904 the various producers of this slate dealt independently with purchasers of such product. In 1904 many of these producers incorporated a company known as the American Sea Green Slate Company, in which they became stockholders. Slate of this sort comes in different dimensions, and apparently it has always been the practice to list the prices of different sizes; competition between the sellers being brought about by variance between the discounts which they would allow on one or more or all of the sizes in which they dealt. To the new company its stockholders sold all their output each year at 10 per cent discount from the company's list prices; and the company sold to all [79] wholesalers, including the plaintiffs, at a discount of 25 cents per square, a square being the quantity necessary to cover 100 feet of roof when laid with a three-inch lap. In 1909 a number of persons engaged in the roofing business in Cleveland, some of whom were and had been customers of the plaintiffs, O'Halloran & Jacobs, organized and became members of a corporation known as Cuyahoga Roofing Company. Thereafter such company was constituted exclusive selling agent of defendant company in Cleveland. For all further facts, other than such as are incidentally referred to hereinafter, the opinion in the District Court should be consulted.

[1, 2] Preliminary to any discussion we may state, as to the Cuyahoga Company, that its appointment as exclusive

selling agent is a matter of no importance. If upon examination of the record the conclusion were reached that the original combination, the American Sea Green Slate Company, was not one obnoxious to the Sherman Act, it could appoint an exclusive selling agent anywhere. See our decision in *Locker* v. *American Tobacco Co.*, 218 Fed. 447, 134 C. C. A. 247 (Nov. 10, 1914). If, however, the Sea Green Slate Company were an unlawful combination, then damages directly caused by reason of its appointment of an exclusive agent might be shown, on the same theory that damages caused by other of its acts could be shown.

Important causes involving the construction of the first two sections of the Sherman Act are now before the Supreme Court; some have been argued, others will be argued in the near future. About the facts in the case at bar there is much to be said on both sides. If any reversible error be found, which would result in a new trial, it would seem to be wiser not to pass upon the questions now before the Supreme Court. The answers of that tribunal to those questions will be made known before a new trial can be had. Therefore, without now discussing the question whether the Sea Green Slate Company was a combination of the sort forbidden by the Sherman Act, and assuming for the purposes of this writ of error that it was such a combination, we proceed directly to a consideration of the findings and conclusions assessing damages.

[3, 4] To recover under the seventh section plaintiffs must show that, as a result of defendants' acts, actual damages were sustained—damages in some amount which is susceptible of expression in figures. These damages must be proved by facts from which their existence is logically and legally inferable—not by conjectures or estimates. They must not be speculative, remote, or uncertain. As we understand the law, a jury may not merely *guess* that plaintiff lost $1,000 or $10,000 which they might have made, even if they feel reasonably sure that some loss was sustained. They cannot award damage as they do for pain or suffering in an action for personal injuries, or for reputation as they do in a libel suit.

That was a defect in the original Sherman Act from the viewpoint of the individual trader; the treble damage section frequently did not give him relief. He could only get such relief by stirring up the Government to apply for an injunction and dissolution of the combination. That defect is now cured by the Clayton Act, which gives the injured [80] party equitable relief to terminate the illegal combination, which is hurting him.

Judge Ray found $7,522.95 actual damage, which he trebled. The items of this are these:

1. Because plaintiffs were compelled to buy slate at a price higher than the market value. They bought 68,434.21 squares	$6, 126. 97
2. Loss of the business of Morgan Bros. and two others (which was worth the sum of $61.50 a month as the judge finds)	1, 045. 50
3. Loss on 720 squares	172. 08
4. Loss on 640 squares	152. 96
5. Loss by expenses of an Akron shipment	25. 44
	7, 522. 95

[5] 1. As to the damages for loss resulting from the circumstance that plaintiffs were compelled to buy at a price higher than the market value: Certain suggestive facts are found in the findings. Thus it appears that in the period prior to the advent of the Sea Green Slate Company plaintiffs bought and sold 35,571 squares (an average of about 8,200 a year). In the period when the company was in existence they bought and sold 66,434 squares (an average of about 12,500 a year). To infer that the result of the combination was to reduce the volume of their business is not warranted by these figures. In the period prior to the company's advent plaintiffs made a gross profit, on sea green slate, of $11,089.02 (an average of something over $2,300 a year). In the period when the company was in existence they made a gross profit of $18,435.37 (an average of something over $3,300 a year).

The fundamental difficulty, however, with the figuring by which the conclusion was reached that their loss was $6,126.97 is that the "market price" for all varieties of slate

Opinion of the Court.

is taken at the list price, less 10 per cent. It is true that such is the price which the Sea Green Slate Company agreed to pay and did pay to the producers from whom it bought. But the company contracted to and did buy every producer's *whole* product, as produced. This included sizes slow of sale as well as sizes largely desired. Plaintiff only bought such sizes as it had orders for, or knew it could promptly place. It seems an unfair assumption, under these circumstances, that, had there been no combination, the plaintiffs could have bought all the squares they desired from the producers at a uniform discount of 10 per cent. Unless there be given more evidence as to market value during the years in question, we do not see how this specific amount of "loss" can be calculated.

[6] 2. There is allowed $1,043.50 for the loss of the business of three concerns doing business in Cleveland, viz, Morgan Bros., David & Glaive, and Koberna. This is figured out as follows: Prior to the organization of the Cuyahoga Roofing Company, plaintiffs sold sea green slate in Cleveland to the three concerns enumerated. Subsequent to such organization these concerns ceased to buy such slate from plaintiffs; therefore, it is contended, the rate of profit which plaintiffs made on sales to these three concerns during the years the latter did purchase such slate is the measure of the profit plaintiffs would have made during the period of the existence of this roofing company. This [84] figuring is highly speculative; it presupposes that the three concerns would have bought as much sea green slate per annum in the later years as in the earlier ones. There is no evidence to support any such supposition; the finding merely states that the three concerns (during the later period) discontinued all purchases from the plaintiffs, and "discontinued their business as independent roofers, but continued their business solely as members of the roofing company." How much slate the business brought into the [illegible] company by these three concerns amounted to, or [illegible] any slate at all of this kind was obtained through [illegible] company, for any customers originally of the [illegible] does not appear. No one of the three was

[7] Moreover, without any testimony from the three concerns, it is assumed that they ceased buying from the plaintiffs because of defendants' acts. But these three concerns were free to change at will; several reasons might be suggested why they ceased buying from the plaintiffs. It was for the plaintiffs to show that the change was *because* of defendant's combination. If that were the reason, it was *provable* out of the mouths of the three dealers; merely to infer it from the fact that they made the change is pure speculation.

3 and 4. Loss on 720 squares in 1909 and 640 squares in 1910 in Cleveland, where the Cuyahoga Company was exclusive selling agent: As to these squares it is found that plaintiffs bought them and sold them at list price, 23.9 cents per square. By reason of this circumstance the court finds that they were injured $172.08 and $152.96 (these sums including expenses of sale). A statement put in evidence, taken from plaintiffs' own books, showed that during the period when the Cuyahoga Company was in existence plaintiffs sold in Cleveland 5,867 squares in 1909 at a profit of 33 cents per square and 3,768 squares in 1910 at a profit of 29.5 cents per square. Inasmuch as in the thirty-eighth finding it is shown that in the 4½ years prior to the advent of the Sea Green Slate Company plaintiffs' profits on their total sales of this slate was at 29.5 cents per square yard, it is difficult to see how, if these 720 and 640 squares are included in the list of sales above referred to, direct loss on sales in Cleveland by reason of the combination can be found. We are unable to determine whether or not these special sales are therein included, and, if not, why they are not. It seems unnecessary, however, further to discuss these small items, because the result of our decision as to the large items will involve a new trial, when points which are now obscure may be illuminated by further proof.

5. Expenses on Akron shipment: According to the findings, defendants refused on a certain date to sell to plaintiffs sea green slate for shipment into Cleveland; this refusal presumably was to carry out the objects of the combination. Requiring some slate for delivery in Cleveland, plain-

Syllabus.

tiffs ordered a lot to be shipped to a firm at Akron, intending to divert it while en route to Cleveland for plaintiffs' account, under some arrangement with the Akron firm. Plaintiffs failed so to divert it, and it had to be reshipped from Akron to Cleveland, thereby putting plaintiffs to an additional expense for extra switching and [82] freight charges. This expense, $25.44, was allowed as damages, and trebled. The finding does not show whether this expense was incurred solely because plaintiffs had to get the goods in this roundabout way or whether, if they had given timely and proper notice of diversion to the railroad, the goods would have reached them without additional expense. Presumably this point will be made clear on a new trial.

The judgment is reversed.

UNITED STATES *v.* SOUTHERN WHOLESALE GROCERS' ASS'N ET AL.

(District Court, N. D. Alabama, S. D. August 4, 1913.)

[207 Fed. Rep. 434.]

MONOPOLIES (§ 24)—ACTIONS—DECREE—VIOLATIONS.—Where, in a suit against an association of wholesale grocers whose constitution and by-laws stated its purpose to be the promoting of harmony between the members of the association and the manufacturers of food products, to the end that the wholesale grocers might be recognized as the economical channel of distribution of the products of the manufacturers, to restrain alleged violations of the Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), the decree, after enjoining certain acts, expressly provided that the association, its officers and members, were not restrained from maintaining the organization for social or other purposes than those therein prohibited, the mere maintenance of the association subsequent to the decree under the same constitution and by-laws was not a violation of the decree, since it would be presumed that the court familiarized itself with the fundamental nature of the association as set out in its constitution and by-laws, and in view of this presumption the decree was intended to mean that the court found no illegality in the framework of the association's organization but only in certain of its activities, which were expressly enjoined.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

Syllabus.

[435] MONOPOLIES (§ 24)—ACTIONS—DECREE—VIOLATIONS.—A decree enjoining an association of wholesale grocers from publishing any book, pamphlet, or list containing only the names of wholesale grocers who had announced their intention or agreed, directly or indirectly, expressly or impliedly, to work in harmony with the association was violated by the issuance of lists, the names in which were purposely confined to those, whether members or non-members or those otherwise not in sympathy with its purposes, who worked in harmony with the association in effecting its purpose of confining the sales of manufacturers to those who were exclusive wholesalers, and the addition or omission of names with intent to evade the decree did not change the situation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MONOPOLIES (§ 17)—COMBINATIONS PROHIBITED—DISCRIMINATIONS IN SALE OF GOODS.—A contract between many engaged in the same business to refrain from selling to an individual or class would be an illegal restraint of trade under the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), prohibiting contracts, conspiracies, or combinations in restraint of trade, unenforceable at law and subjecting the participants to a criminal prosecution, whether the contract were express or implied or consisted of a mere combination or conspiracy to accomplish that end or without any definite form of agreement.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

MONOPOLIES (§ 24)—ACTIONS—DECREE—VIOLATIONS.—Where the decree in a suit against an association of wholesale grocers to enjoin certain alleged violations of the Anti-Trust Law, after enjoining certain acts, specifically provided that the association, its officers and members, were not restrained from maintaining the organization for social or other purposes than those therein prohibited, the exaction of a promise from prospective members not to sell direct to consumers while they remained members of the association, without requiring any oath to this effect or imposing any forfeit, fine, or penalty except ineligibility to continued membership, was not a violation of the decree, since, the membership being limited to exclusive wholesalers, the purpose of this promise was merely to convince the association that there was a reasonable expectation on the part of the applicant that he would remain eligible long enough to justify his admission to membership.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MONOPOLIES (§ 24) — ACTIONS — DECREE — VIOLATIONS. — In a suit against an association of wholesale grocers to enjoin alleged violations of the Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), the decree enjoined the associa-

Syllabus.

tion, its directors, officers, etc., from doing any act to hinder or prevent, by intimidation or coercion, any person, firm, or corporation from selling any commodity to any other person at any price agreed upon. The association had previously issued lists of exclusive wholesale grocers, called the "Green Book," as a means of compelling manufacturers to confine their sales to those whose names appeared on the list. Subsequent to the decree there was no express repudiation of the former policy of coercion, and the association continued to send its lists to manufacturers and on request to furnish manufacturers information as to the standing of applicants for the privilege of buying direct from manufacturers. *Held*, that these acts constituted a violation of the decree, since, considered in connection with the former policy of coercion, they constituted a deliberate utilization by the association of the influence over the manufacturers which its previous policy had gained for it, especially where subsequent **[436]** to the decree it mailed to manufacturers a circular stating that it would continue to issue the "Green Book," and that none of its methods, rules of practice, or activities would be affected by the decree, difficulty continued to attend the direct buying from certain manufacturers supplied with lists unless the buyer's name appeared on the lists, and a general impression prevailed that listing was essential to direct buying privileges.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MONOPOLIES (§ 12)—COMBINATIONS—STATUTORY PROVISIONS.—An association of wholesale grocers, by addressing legitimate argument to manufacturers to procure the abandonment by manufacturers of a certain policy and the continuance of another policy, did not violate the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), prohibiting contracts, conspiracies, or combinations in restraint of trade, nor a decree enjoining violations of that act, but expressly permitting the association to continue its organization for social or other purposes than those therein prohibited.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 24)—ACTIONS—DECREE—VIOLATIONS.—Where a director of an association of wholesale grocers, which, with its directors, officers, etc., had been enjoined from preventing manufacturers, by coercion or intimidation, from selling direct to retailers, made use of the association's name and his position in it as a director to prevent such direct sales by a manufacturer, the fact that as a director he had no authority to take such action, while it might exonerate the association, did not have that

Opinion of the Court.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

INJUNCTION (§ 225)—DECREE—VIOLATIONS.—Violations of an injunction decree were not excusable because those violating it did not intend to violate it or were ignorant of the meaning of its terms.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 474–477, 480–483; Dec. Dig. § 225.]

CONTEMPT (§ 9)—OBSTRUCTION OF ADMINISTRATION OF JUSTICE.—Under Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), authorizing United States courts to punish contempts of their authority, but providing that such power shall not be construed to exend to cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the writing of letters by a party enjoined from doing certain acts, criticising the Government and the litigation instituted by it, resulting in the injunction, but not directly calculated to incite disobedience to the injunction decree, was not a contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 15–18; Dec. Dig. § 9.]

Prosecution for criminal contempt against the Southern Wholesale Grocers' Association and others. The defendant named and three other defendants found guilty, and all other defendants discharged.

O. D. Street, U. S. Atty., of Birmingham, Ala.

Luke E. Wright and *Caruthers Ewing*, both of Memphis, Tenn., and *Percy, Benners & Burr*, of Birmingham, Ala., for defendants.

GRUBB, District Judge.

This is a proceeding against the defendants for a criminal contempt, alleged to have been committed by them [437] through the violation of a final decree of this court entered in a cause on the equity side of its docket, in which the United States was plaintiff and the association and its officers and some of its members were defendants. The purpose of the bill in the equity cause was to restrain the defendants from the commission of certain acts alleged to be violations of the act of Congress of July 2, 1890, commonly known as the Sherman Anti-Trust Law, and to have the as-

Opinion of the Court.

sociation declared to be an illegal conspiracy in restraint of trade and dissolved for that reason. After the cause was at issue and some of the proof taken, the United States, through the Department of Justice, and the defendants came to an agreement with relation to its subject matter, which was consummated by the entry in the cause of a final decree by the Circuit Court, with consent of the parties. The decree was entered of record October 17, 1911, and a copy of it is appended to this opinion. The decree did not dissolve the association, and it, in fact, continued its organization and at least some of its previous activities thereafter and up to the time the present proceedings were instituted against it by the United States in February, 1913.

The amended specifications of the acts on which the United States relied to show a violation of the decree are 51 in number. It is not necessary to consider them seriatim. They may all be classified into five distinct kinds and so treated. They relate: (I) To the maintenance of the organization after the date of the decree for the purposes and objects set out in its constitution and by-laws; (II) to the issuance of lists of wholesale grocers, issued after the decree, alleged to have been of the description enjoined thereby; (III) to alleged acts of the association in exacting promises from prospective members not to sell direct to consumers; (IV) to alleged undue persuasion or coercion exercised by the association, its officers and members, upon manufacturers to prevent their selling their products direct to the retailer or for the accomplishment of other objects and purposes; and (V) to acts of the association through its president or other officers and members alleged to have been obstructive of justice, in that their effect was to disparage the decree and induce disobedience thereto. The United States introduced evidence in support of each of these five classes of acts. It was not seriously controverted that they happened, if at all, in connection with interstate commerce, so as to confer jurisdiction on the court.

The [illegible] much whether the specific acts com- plained [illegible] States were in fact done as it w[illegible] which [illegible] them, under the circumstances, con-

stituted violations of the decree of the court, and it is to this aspect of the case that this opinion will be addressed. The United States disclaims any purpose of asking punishment for any act not a violation of the act of July 2, 1890, though it might be held to be a violation of the terms of the decree. It rested its case entirely upon the first section of the act of July 2, 1890, which prohibits contracts, conspiracies, or combinations in restraint of interstate trade.

[1] I. The United States contends that an association having the declared purposes of the defendant association constitutes by its very existence a conspiracy in restraint of interstate trade and commerce, [438] in violation of the Sherman Anti-Trust Act. The decree does not enjoin the maintenance of the organization of the association. On the contrary, it contains the express recital:

"The said association and its officers and members are not restrained from maintaining said organization for social or other purposes than those herein prohibited."

In order to constitute an act or omission a contempt, the United States is, in view of its concession, required to establish, with the degree of certainty required in criminal cases: (1) That the act or omission is a restraint of interstate trade under the Sherman Law, and (2) that it is prohibited by the terms of the decree. No reciprocal concession was made by the defendants, having the effect of relieving the plaintiff from establishing the second proposition.

The contention of the Government is that, while the decree permits the continued maintenance of the association's organization as a legal entity, it does not legalize its existence for the purposes and objects set out in its constitution and by-laws. The general tenor of the alleged objectionable purposes there set forth was the promoting of harmony between the members of the association, who were exclusive wholesale grocers doing business in 14 southern States, and the manufacturers of food products, to the end that the wholesale grocers might be recognized as the economical channel of distribution of the products of the manufacturers.

Opinion of the Court.

It is not necessary to determine whether an association with such a declared object would constitute an illegal restraint of trade, without reference to the character of the activities employed by it to accomplish such purposes, and therefore a violation of the Sherman Law, unless it is to be held also to constitute a violation of the terms of the decree in this cause, since both must concur to result in a conviction in this proceeding. It seems to me that the Circuit Court will be presumed to have familiarized itself with the fundamental nature of the association, as set out in its constitution and by-laws, before the decree recognizing its legality was entered, at least to the extent that would have enabled it to pass on the legality of the association, on the face of its organic laws. In view of this presumption, the declaration of the decree that the "said association, its officers and members, are not restrained from maintaining said organization" for certain purposes seems intended to mean that the court found no illegality in the framework of its organization, so far as appeared from its records, but only in certain of its activities, those which were expressly enjoined by the decree. "Said organization" referred to in the decree is the organization under the same constitution and by-laws which is now asserted to be illegal. Not only is there no expressed injunction in the decree against the maintenance of that organization, but an express disclaimer by the court, which prevents any implication of one. Hence the continued maintenance of the organization under the same constitution and by-laws, after the decree, is not a violation of the decree.

[2] II. This relates to the issuance of lists of wholesale grocers by the association since the date of the decree. The part of the decree [439] covering this phase of the case is contained in its first paragraph and is as follows:

"And they and each of them be and are likewise enjoined, restrained, and prohibited from publishing, causing to be published, and [illegible] ng the publication, distribution, or circulation [illegible] or list, wherein is contained only the names of [illegible] ed in the territory embraced by said organization [illegible] and [illegible] agreed directly or indirectly [illegible] harmony with the asso-

It was conceded that the association, after the date of the decree, issued to manufacturers some of its lists that were in existence at the time of the entry of the decree, and also some that were subsequently published by it. The question was whether they were of the kind enjoined.

The association seems to have construed the words of the decree, "to work in harmony with the association," as being synonymous with "members of the association." That this was too narrow a construction is obvious. There was evidence pro and con upon the issue as to whether the list contained the names of persons or firms out of sympathy with the declared purposes of the association. It is clear that, if its names were purposely confined to those (whether members or non-members, or those otherwise not in sympathy with its purposes) who worked in harmony with the association in effecting its purpose of confining the sales of manufacturers to those who were exclusive wholesalers, then it answered the description of the lists that were enjoined by the decree; and the issuance, after the entry of the decree, of such lists would be a violation of it. Nor would the adding to or omission of names from the list, with the intent to evade the decree, change the situation in this respect. Whether the evidence is persuasive beyond reasonable doubt that the lists were of the description enjoined, so that the issue of them, disconnected from the circumstances under which they were issued, constituted of itself a contempt, need not be determined, in view of the difficulty, if not the impossibility, of considering it apart from all the surrounding circumstances, and in view of the decision reached by the court that their issue, considered in connection with the attendant circumstances, constituted a violation of the decree.

III. The third class of acts of the association upon which contempt is predicted relates to the promise, alleged to have been exacted of the prospective members of the association by it, as a condition to election and continuance in membership, viz, not to sell direct to consumers while they remained members of the association.

[3] It may be conceded, as contended by the plaintiff, that a contract between many engaged in the same business

Opinion of the Court.

to refrain from selling to an individual or a class would be an illegal restraint of trade under the Sherman Act, unenforceable at law and subjecting the participants to a criminal prosecution thereunder. Such a contract might be express or implied, or consist of a mere combination or conspiracy to accomplish that end. No definite form of agreement is required. The question in this case is whether such a contract, combination, or conspiracy can be deduced from the facts in evidence.

[440] [4] The membership of the association was by its constitution (which met the approval of the Circuit Court) limited to exclusive wholesale grocers. To admit one to membership it was first essential to determine his qualifications. It was therefore necessary for the association to ascertain, concerning each applicant for membership, whether he was at the time he sought membership an exclusive wholesaler. It would otherwise have been impossible to maintain an association composed only of the wholesale grocers, and the decree recognizes the propriety of an organization with such a membership. It would be equally impossible to maintain a like organization if members, after admission, were free to engage in retail business and still remain members. It was therefore proper for the association to purge itself of retailers and semi-jobbers. A means of doing this was to investigate the business of members and drop those who might have lapsed into retailers. It would be futile to admit one to membership, unless his expectation when admitted was to remain an exclusive wholesaler for a reasonable length of time, since otherwise he would cease to be eligible to continued membership as soon as he reverted to the retail business. There could be no impropriety, for the purpose of determining present and future eligibility, to ask and receive assurances from the applicant that he expected to engage, while a member, in the exclusive wholesale business. There was [illegible] way of determining eligibility to mem- [illegible]. No oath to refrain from selling [illegible] administered to the applicant, and [illegible] imposed in case the promise

was broken by him. No sanction accompanied the applicant's assurance or promise, and the only liability that followed a lapse on the part of the new member was ineligibility to continued membership. If an association exclusively of wholesale grocers was to exist, it was necessary that ineligibility be visited upon any member who ceased to be a wholesale grocer. This was as true in the absence of a promise or assurance as if one had existed. The purpose of the assurance was merely to convince the association that there was a reasonable expectation on the part of the applicant to remain eligible long enough to justify admission to membership. His right to sell to consumers was not taken away or impaired for any definite time or at all. He had the option, without restriction. He could not sell direct to consumers and remain a wholesaler. He must either give up the one or the other. This, however, was not by virtue of his promise or assurance, but only because the two things were incompatible with each other, as much so as are black and white.

[5] IV. The fourth class relates to alleged coercion of manufacturers exercised by the association to compel them to confine their sales to exclusive wholesalers. There is little evidence in the record of newly occurring acts of coercion of this kind, on the part of the association or its executive officers, after the date of the decree. The president is shown by the correspondence to have repeatedly disclaimed any effort on the part of the association to interfere with the policy of manufacturers in regard to distribution of their products. The disclaimers probably lose some of their force because of their iteration in stereotyped form. It is clear, however, that the record would [441] not sustain a conviction upon these specifications, if the association had had no previous history of coercion. The only instances of attempts even to influence manufacturers since the date of the decree, appearing in the record, relate to the matters of abolishing the practice of giving "free deals" and retaining the practice of guaranteeing manufacturers' products in the hands of wholesalers against declines in prices. Other than these, which are discussed hereafter, the transactions between the

association and the manufacturers were confined to the furnishing of information to manufacturers by the association on request as to the standing of applicants for the privilege of direct buying from the factory and the sending of the lists of the association to manufacturers. If these acts are to be construed merely as offers of assistance to the manufacturers in carrying out a policy of their own voluntary adoption, sympathized with but in no way induced by the association, they would probably not constitute violations of the decree. If there had been no previous history of such coercion connected with the distribution of the lists and the answering of the inquiries by the association, no other construction would be demanded. It is conceded that at one time the association did issue the lists, then designated "Green Book," as a means of compelling the manufacturers to confine their sales to those whose names appeared on the list; and there is shown no express repudiation of the former policy of coercion, aided by such means, before the date of the decree. The former history of coercion cannot be ignored in interpreting the meaning of the continued distribution of the lists and furnishing information to manufacturers, which occurred after the decree. The association itself is charged with knowledge of all it had done in this respect, and it is difficult to conceive that its present executive officers had no actual knowledge of the previous coercion of manufacturers by the association through these means. The litigation in which the association had been involved, arising out of such acts of coercion, necessarily apprised them of it. Construing the acts of the association in issuing the lists after the date of the decree, in the light of the admittedly improper use to which the "Green Book," their predecessor, had been put before the decree, and without any express repudiation of such misuse by the association or its executive officers at any time, the inference seems a natural one that the association continued the issue of the lists and the furnishing of information in answer to inquiries with knowledge that they would have a like effect upon the manufacturers, who thereafter received them, as they had had before the decree. The issue of the lists and the responses to inquiries with this

effect constituted a violation of the act of July 2, 1890 (*Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815), and of the final decree in the equity cause, which expressly enjoined attempts to coerce a manufacturer to refrain from selling retailers or whomsoever he pleased.

These acts have an added significance to that of merely assisting a manufacturer in carrying out a policy of his own voluntary adoption and maintenance and partake of the coercion which had concededly accompanied similar acts of the association before the date of the decree. They constituted a deliberate utilization by the association, [442] after the decree, of the influence over the manufacturers which the previous policy of coercion had gained for it before and up to the time of the decree. It is not necessary, however, to decide whether such acts, in the absence of any misleading statements as to the effect of the decree, would constitute violations of its terms. There were such misleading statements made to the manufacturers. The association, on October 31, 1911, through its president, addressed to all manufacturers on its mailing list a circular, which purported to be a response to inquiries from certain manufacturers as to whether the association would continue to issue the "Green Book" after the decree, and which stated that it would continue to do so, and that none of the methods, rules of practice, or activities of the association would be affected by the decree. In the light of the previous history of coercion, attending the distribution of the "Green Book," this could only have meant that the manufacturer who sold to unlisted persons would still incur the displeasure of the association. A previous circular addressed to members, but also sent to manufacturers, cannot be said to have corrected the impression received from the circular of October 31, 1911. It was not addressed to manufacturers; it was not the last word of the association but was prior in point of time to that of October 31, 1911, and was not calculated by language to remove the impression naturally created by the circular of October 31, 1911, that the lists, which superseded the "Green Book," would continue to be issued by the association and with like effect as had been the "Green

Book." That it was so understood by the manufacturers, members, and those desiring to become members or to be listed, so as to be entitled to direct buying privileges, appears from the evidence tending to show that after the decree, as before, though probably to a less extent, there was a difficulty attending the direct buying from certain manufacturers who were supplied with the lists by the association, unless the name of the buyer appeared upon the lists, and a general impression that being listed was essential to direct buying privileges. This seems a fair deduction from the evidence, even after making allowance for the argument that the manufacturer and his salesmen would naturally be inclined to make the association a scapegoat for their own disinclination to sell the retailer. The record also shows that the president of the association acquired knowledge that this condition of the trade continued after the date of the decree and up to the time of the commencement of this proceeding. It is true that he consistently stated it was not the function of the association to interfere with the manufacturer in his policy of distribution, yet it seems clear that these results of the issuance of the lists became known to him from the correspondence addressed to and received by him, and that he took no steps to correct the impression that had become so general in the trade.

For these reasons, I think the association and its president violated the decree in sending the lists and information to the manufacturers, under these conditions, and when chargeable with this knowledge. The secretary was also technically guilty, but the evidence shows his acts were ministerial and that he had no direction of the policy of the association.

[443] [6] The Government also contends that the association, through its president, violated the decree in writing to manufacturers with the purpose, in one instance, to persuade the manufacturer to abandon the policy of giving "free deals," and in another to persuade the manufacturer to continue the policy of guaranteeing the prices of its goods, in the hands of the jobber, against declines. I do not find it necessary to determine the merits of these policies or their effect on prices. The letters written the manu-

facturers by the association seem to me to contain only legitimate arguments to support the contentions of the association. They contain on their face no hint of coercion or intimidation. It is conceded that in each case they failed to persuade the manufacturer to act as the association desired. While it is true that argument, addressed by a combination to an individual, should be closely scrutinized in order to detect any veiled threat which may be cloaked under the language of argument, I do not think that such an inference can be fairly drawn from the correspondence relating to the discussion of the policies mentioned. Unless, therefore, it be true that a combination in the form of an association is disabled for that reason from addressing fair and legitimate argument to unorganized individuals, with the purpose of redressing what it considers to be grievances, the decree has not been violated by these acts. The contention of the plaintiff is that the Sherman Act prohibits a combination from addressing even legitimate argument, which may affect interstate trade relations, to an individual engaged in trade of that character. If the principle is correct, it would work the extinction of all trade organizations except for purely social purposes. Their only other valuable function is to redress trade grievances by legal methods. If persuasion by argument, made in good faith and without coercion, express or implied, is not open to them for that purpose, their usefulness is at an end. It will not be denied that there are real advantages to be derived from a proper kind of coöperation, not obtainable by a single individual, unaided. It would be an unfortunate construction of the Sherman Law that would deprive individuals of the benefit and protection to be obtained from such coöperation. The decree permits the organization to continue to exist for other than social purposes; indeed, for all purposes other than those expressly enjoined. This impliedly recognizes that it may have other useful functions which it can legally perform. No authority has been cited that goes to the extent contended for by the Government, and I am not prepared to create one.

[7, 8] There are two of the many defendants, outside of the association and its president, against whom the evidence

of coercion is convincing. These are the defendants H. Lacy Hunt and L. A. Melchers. In each case the defendant attempted to prevent a manufacturer from selling a retailer direct, by a covert threat of the withdrawal of patronage of the writer and the other jobbers of the locality. In the case of Mr. Melchers there is a fair inference from his previous activities in connection with the association, from his furnishing to the manufacturer concerned the list of the association, as his guide in making sales, and from his mention of the local jobbers, that he was using the influence of the association to accomplish his [444] purpose. In the case of Mr. Hunt the use of the association's name and his position in it as a director, to fortify his influence as an individual, is express and unmistakable. He excuses his act by want of authority as a director to do what he stated in his letter to the manufacturer he would do. While this might exonerate the association, it cannot have that effect as to Mr. Hunt. He was a member, but not a director, when the decree was entered and testifies that he never saw or read it. The evidence of the Government tends to show that copies of the decree were sent by registered mail to all members of the association. The defendant Hunt had knowledge of the fact that the association had been enjoined. Before attempting or assuming to act in his capacity as a director, as he did do, it was his duty to inform himself of the effect of the injunction, and, failing to do so, he acted at his peril. Both defendants testify that they had no intention of violating the decree in doing what they did. The decree would be valueless, if those bound by it, and who violate its terms, are permitted to purge themselves by denying the intention to do so or by pleading ignorance of the meaning of its terms.

[9] V. The last class of acts relied upon by the Government as constituting contempt are based upon the idea that the association and certain of its officers and members are guilty of contempt under section 725, United States Revised [illegible]utes (U. S. Comp. St. 1901, p. 583) in that they ob-[illegible]ed the administration of justice by writing disparag-[illegible] [illegible]tigation and of the effect of the decree to [illegible] [illegible]bey it, and so encouraged disobe-[illegible] [illegible]s in the letters, which are relied

on by the Government to sustain these specifications, are largely criticisms of the Government and of the litigation instituted by it, but not directly calculated to incite disobedience to the decree, which is the only way in which this court can consider them. Some of the circulars issued by the association, after the entry of the decree, regarding it, had a tendency to mislead, but they have been given consideration, together with the circular of October 31, 1911, in connection with the specifications based on coercion of manufacturers.

My conclusion is that the defendant the Southern Wholesale Grocers' Association is guilty of contempt in violating the decree of the court, and it is adjudged to pay a fine of $2,500 and such part of the costs as were incurred because of the issues found against it; and that the defendants J. H. McLaurin, H. Lacy Hunt, and L. A. Melchers are guilty of contempt in violating the decree of the court, and each is adjudged to pay a fine of $1,000 and such costs as each incurred because of the issues found against them, respectively. All the other defendants are discharged, with their costs.

DECREE OF INJUNCTION.

"In the Circuit Court of the United States for the Northern District of Alabama.

"The United States of America, Petitioner, v. The Southern Wholesale Grocers' Association et al., Defendants. In Equity. No. 205.

"This cause coming on to be heard before D. D. Shelby and Don A. Pardee, Circuit Judges, and Thos. G Jones, District Judge, come the United States of America by Oliver D. Street, United States attorney for the Northern Dis[445]trict of Alabama, and O. E. Harrison, Special Assistant to the Attorney General, who prosecute in this behalf, and come also the defendants, by their solicitors, Lake E. Wright and Caruthers Ewing, and petitioner moves the court for an injunction in accordance with the prayer of the bill, and by consent of all parties, in open court, it is adjudged, ordered, and decreed as follows:

"(1) That the said defendants, the Southern Wholesale Grocers' Association, and all the members of said association, the Southern Wholesale Grocers' Association, a corporation, the McLester-Van Hoose Company, James A. Van Hoose, Robert McLester, the Alabama Grocery Company, S. W. Lee, Joseph H. McLaurin, L. M. Hooper, F. E. Hashagen, C. W. Bartleson, Robert Moore, Thomas C. Davis,

Decree of Injunction.

B. B. Earnshaw, C. C. Guest, T. H. Scovell, W. T. Reeves, R. A. Morrow, J. H. C. Wulburn, J. D. Faucette, W. A. Scott, and James W. Lee, and each and all of them, their directors, officers, agents, servants, and employés, and all persons acting under, through, by, or in behalf of them or either of them, or claiming so to act, be, and they are hereby, perpetually enjoined, restrained, and prohibited from combining, conspiring, confederating, or agreeing together or with others expressly or impliedly, directly or indirectly, to prevent manufacturers or producers engaged in selling or shipping commodities among the several States and in the District of Columbia from selling such commodities to any person who is not a member of the said the Southern Wholesale Grocers' Association, or who is not listed on the so-called Green Book, published by said association, its officers, and agents, and entitled 'Official List of Wholesale Grocers in the States of Alabama, Arkansas, District of Columbia, Florida, Georgia, Indian Territory, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia,' or any book, pamphlet, or list of like character; and they and each of them be and are likewise enjoined, restrained, and prohibited from publishing, causing to be published, aiding, assisting, or encouraging the publication, distribution, or circulation of any book, pamphlet, or list wherein is contained only the names of wholesale grocers located in the territory embraced by said organization who have announced their intention or agreed, directly or indirectly, expressly or impliedly, to work in harmony with said association.

"They are also enjoined, restrained, and prohibited from publishing or distributing, or causing to be published or distributed, or aiding or assisting or encouraging in the publication or distribution of any list or lists of manufacturers or producers who have, expressly or impliedly, directly or indirectly, agreed to sell only to members of said association, or to persons, firms, or corporations listed in said Green Book, or book, pamphlet, or list of like character.

"(2) That the said defendants and each and all of them, their directors, officers, agents, servants, and employés, and all persons acting under, through, by, or in behalf of them, or either of them, or claiming to so act, be, and they are hereby, enjoined, restrained, and prohibited from combining, conspiring, confederating, and agreeing together or with others to fix a price at which any commodity shall be sold, or to coerce manufacturers and producers engaged in selling and shipping commodities among the several States, and in the District of Columbia, to fix a limited selling price at which such commodities are to be sold, and to have such price printed on cards and distributed; and they are hereby enjoined, restrained, and prohibited from printing, causing to be printed, or encouraging or aiding in the printing of such cards or their distribution; and they and each of them are likewise enjoined, restrained, and prohibited from conspiring, confederating, or agreeing together or with others,

Decree of Injunction.

expressly or impliedly, directly or indirectly, to prevent such manufacturers and producers from selling and shipping commodities to any wholesale grocer who does not maintain the price so fixed and listed; and they and each of them are likewise enjoined, restrained, and prohibited from demanding and receiving from any such manufacturer or producer any rebate, bonus, or emolument of any kind to be paid to any wholesale dealer or jobber for and on account of the fact that he has maintained the limited selling price, and are likewise enjoined, restrained, and prohibited from paying or delivering any such rebate, bonus, or emolument of any kind, directly **[446]** or indirectly, to any such wholesale grocer or jobber who has maintained such limited selling price, or demanding or receiving any fine or penalty, directly or indirectly, from any wholesale grocer or jobber engaged in commerce among the several States and in the District of Columbia for and on account of such wholesale grocer or jobber not having maintained said limited selling price.

"(3) That said defendants and each and all of them, their directors, officers, agents, servants, and employés, and all persons acting under, through, by, or in behalf of them, or either of them, or claiming so to act be and they are hereby perpetually enjoined, restrained, and prohibited from conspiring, confederating, or agreeing together or with others, expressly or impliedly, directly or indirectly, to boycott any manufacturer or producer, wholesaler, or jobber engaged in commerce among the several States and in the District of Columbia for and on account of any such manufacturer, producer, wholesaler, or jobber having sold or transported in interstate commerce any commodity to any person, firm, or corporation who is not a member of said association or who does not maintain the said limited selling price or who is not listed in the said Green Book or book, pamphlet, or list of like character, and also from combining, conspiring, confederating, and agreeing together, or with others, expressly or impliedly, directly or indirectly, to prevent any person, firm, or corporation who refuses to join said association or who refuses to maintain said limited selling price or who sells commodities direct to the consumer from purchasing such commodities from manufacturers, jobbers, producers, or wholesalers engaged in commerce among the several States and in the District of Columbia, and also from conspiring, confederating, and agreeing together or with others, expressly or impliedly, directly or indirectly, to increase jobbers' profits by increasing prices at which wholesalers and jobbers shall sell any commodity in interstate commerce.

"(4) That said defendants and each and all of them, their directors, officers, agents, servants, and employés, and all persons acting under, through, by, or in behalf of them or either of them or claiming so to act, be, and they are hereby, perpetually enjoined, restrained, and prohibited from conspiring or agreeing together or with others, expressly or impliedly, to do or to refrain from doing anything, the

Opinion of the Court.

director of the defendant Independent Ice Company, who holds in trust the majority of that company's voting stock.

After setting forth acts of the other defendants from which the above claim for damages is alleged to have arisen in the Independent Company's favor, the bill alleges a demand, made by the plaintiffs as stockholders in that company, upon its president and directors for the institution of a suit in its name, under section 7 of the Anti-Trust Act, against the Boston Ice Company for the damage claim [460] alleged to exist and the failure or refusal of those directors to bring such suit. The relief prayed for is: (1) An account of the damages sustained by the Independent Company and a decree for three times the amount thereof, with costs and attorney's fee, to be paid either by the other defendants to said company or a part of said damages, in proportion to the stock owned by them, to be paid by the defendants to the plaintiffs; (2) in the alternative, the appointment of a receiver to sue for and collect such damages; (3) for other and further relief, etc.

According to the bill, the plaintiffs are Massachusetts citizens and so also are the defendants, the Boston Ice Company, George A. Taylor, the Independent Company's treasurer, and Frank J. Bartlett, the American Company's president. The bill discloses no matter in controversy, therefore, between citizens of different States and is maintainable in this court, if at all, only because it presents a matter in controversy arising under the Federal statute referred to.

The bill does not ask for any preventive relief, such as it would be within the general equity jurisdiction of the court to afford, against injury resulting or to result from an unlawful combination. Of such a suit the court might have jurisdiction independently of diverse citizenship because a Federal question was involved. *Chalmers, etc., Co.* v. *Chadeloid & Co.* (C. C.), 175 Fed. 995. On the contrary, as the plaintiffs expressly state in their brief, the suit is one "to enforce a remedy provided by the act itself; that is, a judgment for threefold damages and costs." The defendants raise the objections that the court has no jurisdiction to entertain the bill or grant the relief for which it prays, and

that it has no jurisdiction to entertain any suit in equity under the act wherein any person other than the United States, by its Attorney General, is the plaintiff. These objections are first to be considered.

[1] As the plaintiffs concede, it is settled that a stockholder cannot maintain a suit at law authorized by section 7 of the act for injury to the business of his corporation whereby the value of his stock is impaired. The right of action created by this section is in the corporation alone, representing all its stockholders. *Ames* v. *American, etc., Co.*, 166 Fed. 820 (C. C. Mass. 1909); *Loeb* v. *Eastman, etc., Co.*, 183 Fed. 704, 106 C. C. A. 142 (C. C. A. 3d Circ. 1910). They are therefore obliged to contend that the act permits minority stockholders to accomplish through a bill in equity what they could not accomplish by a suit at law under section 7, jurisdiction whereof, as that section expressly provides, might be had in any district where the defendants could be found, irrespective of diverse citizenship or amount.

The Anti-Trust Act contains express provisions determining the remedies whereby and the courts wherein its provisions are to be enforced, instead of leaving them to be ascertained according to the general statutory provisions governing such matters. Section 7, regulating suits at law, has been referred to. Section 4 invests the Federal courts with jurisdiction "to prevent and restrain violations of this act," but goes no further in expressly giving them jurisdiction in [461] equity, and by the same section it is made the duty of the law officers of the Government to institute the equity proceedings authorized.

In view of these express provisions, the Court of Appeals for the Fifth Circuit has held, in *Gulf, etc., Co.* v. *Miami, etc., Co.*, 86 Fed. 407, 420, 421, 30 C. C. A. 142 (1898), that suits in equity or injunction suits by other than the Government of the United States are not authorized by the act. And the Court of Appeals for the Second Circuit has later held, in *National, etc., Co.* v. *Mason, Builders, etc.*, 169 Fed. 259, 263, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148 (1909), that the injunctive remedy is available to the Government only, and the individual can only sue for threefold damages. These are

Opinion of the Court.

the only Court of Appeals decisions found regarding suits in equity under the act. The greater part of the decisions in the lower Federal courts have been to the same effect. See *Blindell* v. *Hagan* (C. C.), 54 Fed. 40 (1893); *Pidcock* v. *Harrington* (C. C.), 64 Fed. 821 (1894); *Greer* v. *Stoller* (C. C.), 77 Fed. 2 (1896); *Southern, etc., Co.* v. *United States, etc., Co.* (C. C.), 88 Fed. 659, 663 (1898); *Block* v. *Standard, etc., Co.* (C. C.), 95 Fed. 978 (1899); *Metcalf* v. *American, etc., Co.* (C. C.), 108 Fed. 909 (1901), and (C. C.), 122 Fed. 115, 126 (1903). In the last-cited case, as in this, the bill was brought by a minority of stockholders and it sought not only to have a transfer of the corporation's property set aside as void under the act but also treble damages according to section 7. A view contrary to the above has been taken in *Bigelow* v. *Calumet, etc., Co.* (C. C.), 155 Fed. 869, 876 (1907), and *Mannington* v. *Hocking, etc., Co.* (C. C.), 183 Fed. 133, 140 (1910). In the first of these two cases, at least, there was diverse citizenship of the parties. I think the right construction of the act is that adopted by the two Court of Appeals decisions above cited. If, as there held, authority to sue for relief by injunction against violation of its provisions has been given by the act to the Government alone, I am unable to believe that authority to sue in equity for other relief has been given by it to private parties. The plaintiffs urge that since they cannot get the damages they claim at law except through the corporation, they are without remedy unless a stockholder's bill can be maintained. But neither they nor their corporation could claim any right whatever to such damages except so far as the act has expressly given such a right, and the express provisions of the act are not of a character such as permits extending them by implication.

[2] If the above conclusion is right, the bill cannot be maintained. If not, the objections next to be considered are that the allegations of the bill fail to show the defendants to have done anything which the Anti-Trust Act declares illegal or makes a misdemeanor.

The trade or commerce which the bill charges them with combining to restrain or monopolize is described in para-

graph 2. The allegations are: As to the Independent Company, that it has been engaged since its organization in 1895—

"in the business of cutting and harvesting ice, principally in the State of New Hampshire, transporting the said ice to the city of Boston in the State of Massachusetts, and there selling the same; the larger part of said ice being delivered in said Boston, but some being shipping to places outside the State. **[462]** Said defendant Independent Ice Company has thus continuously since the date of its organization been engaged in interstate commerce in ice."

As to the Boston Ice Company, the allegations are that since its organization (the date whereof is not alleged) it has been engaged—

"in the business of cutting and harvesting ice throughout the New England States, transporting the said ice to said Boston, and there selling the same. Said defendant Boston Ice Company has thus been continuously engaged in interstate commerce in ice."

The last clause in each of the two above quotations is of no effect unless the preceding allegations have made it distinctly appear that the business described was "trade or commerce among the several States." Nor, unless this is the case, do any of the later references in the bill to the business here described as interstate trade and commerce assist to bring it under that description. If the bill has charged any combination, monopoly, or attempt to monopolize obnoxious to the statute, it is only with regard to "the trade and commerce in ice between the city of Boston and the various New England States" or "the trade and commerce in ice in said territory." See paragraph 4. What is referred to by the language quoted must be taken as meaning nothing other than the trade or commerce in ice described as above in paragraph 2. The defendants contend that in paragraph 2 no trade and commerce in ice between Boston and the various New England States is described, nor any interstate trade or commerce whatever.

In this contention I think the defendants are right. The Boston Ice Company might well be engaged in cutting and harvesting ice in every New England State, transporting it to Boston, and selling it in Boston without being en-

gaged in interstate commerce at all. The natural import of the allegations is not only that the ice remained the property of the Boston Ice Company from the time it was cut until they had sold it in Boston, but also that the Boston Company itself carried it to Boston after cutting and harvesting it. No combination to restrict or monopolize the transportation of ice between New England points and Boston is anywhere charged in the bill. And if the Boston Company shipped its ice by a carrier from such points outside of Massachusetts to itself at Boston, its subsequent sales thereof in Boston would not necessarily be transactions in interstate commerce. *Banker, etc.,* v. *Penna.,* 222 U. S. 210, 32 Sup. Ct. 38, 56 L. Ed. 168; *Purity, etc., Co.* v. *Lynch,* 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184. The plaintiffs rely upon *Addyston, etc., Co.* v. *United States,* 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Montague & Co.* v. *Lowry,* 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; *Swift & Co.* v. *United States,* 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. But their allegations do not make it possible to say, as in the first case, that the Boston Company was engaged in selling and shipping the commodity manufactured by it into other States under contracts for its manufacture and sale with citizens of such other States, nor that it was engaged, as in the second case, in selling a commodity in one State procured by it from manufacturers in other States, nor that it was engaged, as in the third case, in selling its commodity in one State to dealers and consumers in others, thereafter shipping it in pursuance of such sales.

[463] I am unable, therefore, to hold, on the allegations made, that the Boston Ice Company is shown to have been engaged in interstate commerce in ice. The allegations describing the Independent Company's business are the same with two additions only, not made as to the Boston Company. The first is that the Independent Company cut and harvested its ice principally in New Hampshire; the second is that, having transported its ice to Boston and there sold it, the larger part of it was delivered in Boston, but some was shipped to places outside the State. I see noth-

ing in either of these allegations to justify a conclusion different from that arrived at regarding the allegations about the Boston Company. It is not alleged that it was the Independent Company by whom its ice was shipped to places outside the State, or that, if so, the ice was shipped to purchasers outside the State. The plaintiff has no right to expect the court to supply either of these things by inference.

[3] If the above conclusions are wrong, the objections next to be considered are that no combination or conspiracy to restrain the trade described and no monopolization thereof or attempt to monopolize it are sufficiently alleged in the bill.

The plaintiff has not, as was done in *Swift* v. *United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, upon which he relies, alleged a combination or conspiracy by the defendants to do certain specified acts, with a description of the intended acts sufficient for a determination by the court whether or not a combination or conspiracy to do such acts would or not be a combination or conspiracy to restrain or monopolize the trade or commerce which the act protects. He has, on the contrary, begun by alleging a "combination and conspiracy," which he describes as in restraint of the trade and commerce in ice in New England, entered into by the defendants after they had formed the "plan and purpose of monopolizing" such trade and commerce, and the subsequent coöperation of the defendants to carry out such plan and purpose and continue such combination and conspiracy. This is followed by allegations of subsequent acts done by the defendants, or some of them, "in pursuance of said plan and purpose and in continuation of said combination and conspiracy," and by allegations as to some of these acts that competition has been thereby prevented or destroyed, or a "monopoly," which the Boston Ice Company is assumed rather than alleged to have obtained, thereby protected, perfected, fostered, or sustained. That the acts thus characterized were the acts or among the acts contemplated by the

Opinion of the Court.

"combination or conspiracy" as formed is left to inference; the direct allegations describing this "combination or conspiracy" not going beyond the statutory language. Conceding that the bill is not to be construed like an indictment, and without reference, therefore, to any of the decisions which have dealt with indictments under the act, and conceding, further, that "combination," "conspiracy," and "monopolizing or attempting to monopolize" need not necessarily be alleged separately and distinctly from each other, but may be indiscriminately charged, as here (*Cilley* v. *United, etc., Co.* [D. C.] 202 Fed. 598; *Strout* v. *United Shoe Mach. Co.* [D. C.] 202 Fed. 602) I am still unable to [464] believe that facts constituting an offense or offenses under the act have been alleged with such definiteness and certainty as makes it fair and just to require the defendants to answer the allegations.

It is true that with regard to one of the acts alleged to have been done as above, viz, the obtaining control of the management of the Independent Company by the Boston Company, in 1904, by acquisition of the beneficial interest in in a majority of the Independent Company's stock, the bill avers (paragraph 5) "that said acquisition of control was in itself a contract and combination in restraint of trade and commerce in ice between * * * Boston and the various New England States," and also "an attempt to monopolize the trade and commerce in ice in said territory." But without allegations that there were no other competitors, or of the proportion of the trade and commerce referred to controlled by the two companies before 1904, I am obliged to regard the quoted averments as mere conclusions of law unsupported by any facts alleged.

The defendants object further that no injuries to the Independent Company's business or property are sufficiently alleged. In what the bill sets forth relating to injuries for which damages are claimed, the proportion of definite facts to general and indefinite charges of conduct of a kind which ... to the Independent Company's injury in its ... is indeed small; but, were this the only ... am not satisfied that it ought

to be sustained. It seems to me, on the whole, sufficiently alleged at least that in 1906 the control by the Boston Company was so exercised as to cause acceptance by the Independent Company of a price for certain ice less than its market value and less than the Boston Company, to which it had been sold and delivered, had agreed to pay; also that the same control was so exercised in 1909 as to prevent any sale of certain ice which, but for such exercise of control, might have been profitably sold. I cannot say that these allegations do not describe an injury to the Independent Company's business or property.

Lastly the defendants object that the bill does not contain allegations meeting the requirements of equity rule 94 (rule 27 of the rules of 1912 [198 Fed. xxv, 115 C. C. A. xxv]) with regard to stockholders' bills. A letter dated July 20, 1910, is set forth, alleged to have been sent by the plaintiffs to the president and directors of the Independent Company. In one place it asks for the bringing of suits under the act against all the present defendants except Bartlett and Taylor, in another for the bringing of such a suit as is now brought against the Boston Company alone. A refusal by the directors to bring such suits is alleged, under date of September 7, 1910. The present bill was filed March 8, 1912. There are no allegations that the same president and directors continued in office from July, 1910, to March, 1912. No effort to obtain action by the stockholders independently of the directors is alleged, but it is alleged that further efforts to obtain action by either directors or shareholders would be "manifestly useless." In view of *Delaware, etc., Co.* v. *Albany, etc., Co.*, 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862, and of the relations disclosed in the bill between the plaintiffs and the directors and other stockholders of the Independent Company, I should be unable to sustain [465] this objection by itself, however much is left to be desired by those allegations of the bill which are intended to meet rule 94 (27).

I am obliged, however, for the other reasons stated, to sustain the demurrer.

Demurrer sustained.

Opinion of the Court.

COREY *v.* BOSTON ICE CO.[a]

FERRIS *v.* SAME.

(District Court, D. Massachusetts. August 4, 1913.)

[207 Fed. Rep. 465.]

MONOPOLIES (§ 28)—ACTIONS FOR DAMAGES—INJURY TO PROPERTY—ELECTION TO OFFICES.—Plaintiffs having no right to property in the offices of a corporation which they had previously held, the election of others thereto, even if an act unlawful, because done in pursuance and furtherance of a combination, conspiracy, or an attempt to monopolize, obnoxious to the Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), does not bring them within section 7 giving a right of action to any person injured in his business or property by another by reason of anything declared to be unlawful by the act.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

At Law. Two actions, one by James C. Corey, the other by Jarvis W. Ferris, both against the Boston Ice Company. On demurrers to declarations. Demurrers sustained.

Whipple, Sears & Ogden, of Boston, Mass., for complainants.

Stone & Stone and *Boyd B. Jones*, all of Boston, Mass., for defendant.

DODGE, Circuit Judge.

These two declarations differ only in details unimportant upon the questions raised by the demurrers.

Each plaintiff says that, by reason of unlawful acts of the defendant, he has been "injured in his business and property," and each claims threefold the damages so sustained. Each declaration purports to allege participation by the defendant in a combination and conspiracy in restraint of [illegible] trade and commerce and an attempt by it to

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[illegible] Co. (207 Fed. 428), ante, p. 326 [illegible] Publishing Company.

monopolize such commerce; also that the alleged unlawful acts set forth were done in pursuance and furtherance of such combination, conspiracy, or attempt. The suits therefore are brought under section 7 of the Anti-Trust Act (26 Stats. 209). Each plaintiff says he owns a considerable amount of stock in the Independent Ice Company, a Maine corporation, and was a director of that company from 1895 until February 12, 1908. The plaintiff Corey says that he was also treasurer from 1903 until February 13, 1908, at a yearly salary of $2,100. The plaintiff Ferris says that he was also president from 1903 until February 13, 1908, at a yearly salary of $2,400.

The injury alleged by each to his "business and property" is set forth as follows: According to each declaration the defendant company acquired control of the management of the Independent Com[466]pany, the two corporations having previously been competitors. It obtained and exercised such control by the voting power of a majority of the Independent Company's stock held in trust, and through an election of directors, a majority of whom had been nominees and business associates of the defendant, subservient to its interests and ready to do its bidding. On February 12, 1908, a stockholders' meeting was held to choose directors and officers. The only stock represented was that held in trust as above. In the language of the declarations, "at said meeting the plaintiff failed of re-election as a director." Each declaration then described what had thus been done at the meeting in the following terms:

"And (the plaintiff) was thus dismissed and ousted from said office through the exercise of the voting power belonging to said shares."

In each declaration the plaintiff next alleges that at a subsequent directors' meeting on February 13, 1908, "he was also dismissed and ousted from his office as (treasurer or president) by the election of a new (treasurer or president)," and that "the directors and officers elected at said meeting were the nominees of the defendant."

Reference is made in the declarations throughout to the doings thus described at the meetings of February 12th and 13th as a dismissal or dismissal and ouster of the plaintiffs,

respectively, from the offices above mentioned. It seems to me clear that the use of these terms is not justified by any of the facts alleged. It also seems to me clear that no injury to any business or property of either plaintiff appears from any of the facts alleged. So far as appears, the proper time for an election of corporate officers had come and the respective meetings were duly held for the purpose. The plaintiffs held their respective offices upon no other terms, so far as appears, than that they should be elected in due course. However long they had held their respective offices, or however frequently they may have been re-elected, there is nothing to show that they had any right to expect that they would be chosen again at this or any given election, nor to show any right of property in the offices mentioned or the salaries attaching thereto, or any such interest in them after the dates of the meetings in 1908 as entitled them to say that failure to elect them to those offices was an injury to their business within the meaning of section 7, whether or not the election of other persons in their places can be said to have been acts unlawful because done, as the plaintiffs say, in pursuance and furtherance of a combination, conspiracy, or in an attempt to monopolize, obnoxious to the act. That they lost the salaries they had been receiving and have not been able to get other employment or other remunerative employment since can not therefore give them any rights against the defendant under section 7.

I am further of opinion that no facts sufficient to show that the defendant was a party to or engaged in any combination or conspiracy in restraint of interstate trade or commerce, or engaged in any attempt to monopolize such commerce, are stated in their declarations. The allegations relied on for this purpose are in all material respects similar to those made in case No. [illegible] Equity, a bill in equity filed by James [illegible] et al. in this court March [illegible] (207 Fed. [illegible]), to [462] which bill a demurrer is sustained upon the date of this opinion. To the opinion this day filed in that case, reference may be had for a statement of the reasons [illegible] which the above conclusion is reached.

Defendant's demurrer to the declaration in each of the cases is sustained.

Statement of the Case.

MOTION PICTURE PATENTS CO. v. ECLAIR FILM CO.

(District Court, D. New Jersey. September 4, 1913.)

[208 Fed. Rep., 416.]

MONOPOLIES (§ 21)—SUIT FOR INFRINGEMENT—DEFENSES.—An allegation in the answer in an infringement suit that the United States had instituted a suit for the dissolution of complainant corporation as an illegal monopoly states no ground of defense, since the fact alleged, if proved, would be irrelevant.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 51; Dec. Dig. § 21.]

MONOPOLIES (§ 28)—INJURY TO COMPETITORS—RIGHT TO RECOVER DAMAGES.—That a corporation is a monopoly, in violation of the Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) and subject to dissolution at suit of the Government, does not of itself give a right of action for unfair competition to any particular person, but, to sustain a claim for damages, specific injury must be proved.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

TRADE-MARKS AND TRADE NAMES (§ 92)—UNFAIR COMPETITION—ACTIONS—PLEADING.—Fraud is the basis of all actions of unfair competition, and, as that is never presumed, the facts relied on to show fraud must be pleaded and proved.

[Ed. Note.—For other cases, see Trade-Marks and Trade Names, Cent. Dig. §§ 102, 103; Dec. § 92.]

SET-OFF AND COUNTERCLAIM (§ 8)—IN EQUITY.—A legal demand can not be pleaded as a set-off or counterclaim in an equity suit, but under new equity rule 30 (201 Fed. v, 118 C. C. A. v) it must be a demand "which might be the subject of an independent suit in equity."

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 9-11; Dec. Dig. § 8.]

In Equity. Suit by the Motion Picture Patents Company against the Société Française des Films et Cinematographes "Eclair," trading as the Eclair Film Company. On motion to strike out certain alleged defenses. Motion granted.

Melville Church, of Washington, D. C., and *Louis Hicks*, of New York City, for plaintiff.

Opinion of the Court.

Waldo G. Morse and *John L. Lotsch*, both of New York City, for defendant.

RELLSTAB, District Judge.

[1] The bill of complaint charges infringement of certain patents. The answer sets up as defenses inter alia that the plaintiff was a monopoly denounced by the Federal Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and that it was guilty of unfair competition in the use of such patents. It also interposed a counterclaim for damages sustained by reason of such premises. Of the paragraphs challenged, No. 55 alleges the institution by the United States of a suit against the plaintiff charging that it is a monopoly and combination inhibited by the Anti-Trust Act. It alleges further that the plaintiff is such a monopoly and that it is using the patents in suit in furtherance there[417]of. Neither allegation is a defense. The one averring that such a suit is pending does not charge the existence of such monopoly, but merely that such a charge is made by a plaintiff in another proceeding. The proving of the issue here tendered, viz, that some one else made such a charge, would be no more a defense to the charge of infringement herein laid against the defendant than that such charge would preclude defendant from disproving it. The further allegation that such a monopoly exists, as well as the allegations in paragraphs 56, 57, 58, 59, and 60, charging unfair competition, founded upon the existence of such monopoly and the use of such patents (assuming that these conditions are defenses available in a suit of this character), are couched in too general and indefinite terms to require answer. A separate bill of complaint thus framed would be dismissed on motion under equity rule 29.

[2] That the plaintiff is guilty of an infraction of the Anti-Trust Act and in appropriate proceedings will be dissolved is not enough to constitute a case of unfair competition against a particular person. *U. S. Fire Escape, etc., Co. v.* [illegible] *Co.* (D. C.), [illegible] Fed. [illegible]; *Fraser v. Duffey* (D. C.) [illegible], and cases cited. Specific injury suf- [illegible] nt different from that sustained by it

as a member of the community is essential to its recovery of damages or to restrain further infringement upon its rights. *Borden Ice Cream Co.* v. *Borden's Condensed Milk Co.*, 201 Fed. 510, 121 C. C. A. 200.

It is elementary that a plaintiff in equity must allege with particularity all material (ultimate) facts necessary to establish his right to the relief prayed, and an articulated array of generalities, no matter how well sounding, will not satisfy this requirement. Story's Eq. Pl. § 241; Shipman's Eq. Pl. p. 520; *Wilson* v. *American Ice Co.* (D. C.), 206 Fed. 736.

[3] Fraud is at the root of all actionable unfair competition; and, as no intendment is made in favor of fraud, the facts (but not the mere evidence thereof) upon which such a charge is predicated must be set forth distinctly and with as much particularity as the nature of the transactions involved and the circumstances in which they have their being or development are within complainant's knowledge or could have been ascertained by his employing such means as were at his command. That the pleader had no such idea of his duty in this case is manifest by a reading of the challenged paragraphs. The general charge of unfair competition against the defendant appears. However, this is but a mere conclusion of law. The allegations following pertain almost exclusively to a charge that the plaintiff is violating the Anti-Trust Act and, so far as they may be said to consist in facts, are framed for the purpose of supporting such a charge. The application of such allegations to the defendant is of the most general character. Paragraph 59 will suffice as illustrative of such lack of particularity:

"59. That complainant has under and pursuant to said agreements aforesaid (only one is specifically named and that with the plaintiff's assignor and other persons unnamed) employed the same wholly in, about, under, and in connection with said unlawful combination, agreement, and course of [416] business so in restraint of trade, and that by reason of said unfair competition and unlawful monopoly is wrongfully and unlawfully destroying the business of this defendant, and this defendant is being wrongfully deprived of a large amount of business, and by which the defendant has been and is being damaged in a great amount, the exact amount of such damage or damages as has been inflicted is unknown to the defendant, but which, upon information and belief, it alleges is in excess of [illegible], and that

the defendant is, by the said action of the said complainant herein, being wrongfully and unlawfully prevented from fairly competing with the complainant, and the public thereby greatly deceived, prejudiced, and damaged."

Surely, if the defendant has such a cause of action as entitles it to redress against an unfair competitor, some overt act of the plaintiff, specifically directed against the defendant or its customers, or which injuriously affects the defendant's business reputation and good will specifically, must be known by it and be capable of precise averment. No such acts, however, are pleaded, and the conclusion is irresistible that the purpose of the pleading was not so much to outline the specific injury being perpetrated upon the defendant as a separate identity, as that which it in common with others in the same trade was suffering because of the plaintiff's violation of the Anti-Trust Law. For such injury and violence, only the United States, in the exercise of its governmental power and duty to protect the general public, may bring suit. Anti-Trust Act, § 4; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. For such lack of definiteness and particularity such paragraph must be struck out.

[4] Paragraphs 61 and 62, the remaining ones attacked by this motion, and which are inserted by way of counterclaim, seeking treble damages under such Anti-Trust Act, are also subject to a like infirmity. These, however, are objectionable for a greater (because incurable) reason in that the defendant thereby seeks to set up in an equity suit a claim that can only be maintained in a suit at law. Only counterclaims " which might be the subject of an independent suit in equity " may be set up in an answer to an equity bill. New Eq. Rule 30 (201 Fed. v, 118 C. C. A. v).

The subject matters of all of these paragraphs fall within the condemnation of *Terry Steam Turbine Co.* v. *Sturtevant Co.* (D. C.), 204 Fed. 103, and *Williams Patent Crusher & Pulveriser Co.* v. *Kinsey Mfg. Co.* (D. C.), 205 Fed. 375; but the later case of *Vacuum Cleaner Co.* v. *American Rotary Valve Co.*, 208 Fed. 419, decided by the United States District Court for the Southern District of New

Syllabus.

York (memorandum filed May 2, 1913), holds that practices which amount to unfair competition may be interposed as a defense under such rule. In the present case a decision of this question, for the reasons given, is unnecessary.

All the recited paragraphs, as well as Nos 28, 29, 30, 32, 34, 35, 36, 37, 45, 48, and 54, repeated by such answer in aid of these alleged defenses, in so far as they are thus repeated and relied upon to support them, must be struck out. Prayers 5, 6, and 7, being based on such defenses, must also be struck out.

The motion is granted, with costs.

UNITED STATES v GREAT LAKES TOWING CO. ET AL.[a]

(District Court, N. D. Ohio, E. D. February 11, 1913.)

[208 Fed. Rep. 733.]

MONOPOLIES (§ 12)—ANTI-TRUST ACT—"COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE."—A combination formed for the express purpose and with the express intent of eliminating the natural and existing competition in interstate commerce, and of monopolizing and restraining such commerce by the employment of unusual and abnormal methods of business, or which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation, whereby natural and existing competition in such commerce is unduly restricted or suppressed, is one in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1276; vol. 8, p. 7606.]

COMMERCE (§ 17)—INSTRUMENTALITIES OF INTERSTATE COMMERCE—TOWING TUGS.—Tugs employed in the business of towing into and out of harbors and between ports, vessels engaged in interstate commerce, and in the lightering and wrecking of vessels so engaged, are themselves instrumentalities of interstate commerce.

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[a] For later opinion (217 Fed. 656), see *post*, page 368. Case pending on appeal of the United States in the Supreme Court.

Syllabus.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 10, 11; Dec. Dig. § 17.]

MONOPOLIES (§ 12)—CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE—ANTI-TRUST ACT—"UNREASONABLE RESTRAINT OF TRADE."—While the sale of a business and the surrender of the good will pertaining thereto and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business and not as a device to control or monopolize interstate commerce, is not within Federal Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), the imposition of a restraint greater than necessary to afford fair protection to the legitimate interests of the purchaser constitutes an unreasonable restraint within the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, vol. 7, pp. 6185, 6186.]

[734] MONOPOLIES (§§ 12, 16)—ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.—The Great Lakes Towing Company was organized in 1899, and shortly afterwards acquired in its own name, or that of controlled companies, the property and good will of practically all local tug operators in 14 of the principal Lake ports, not including Lake Ontario. These purchases were made under contracts which bound the sellers not to engage in the towing or wrecking business on any of the Great Lakes except Ontario for a period of five years. In this manner the company acquired some 120 tugs. It also made a contract with another owner whose tugs were not bought, by which he bound himself, in consideration of an annual payment to him in cash, not to do any towing on the Great Lakes for a term of five years. Whenever local competition later developed, the company at least met any cut rates at that port, even at a serious loss, until competition was ended, after which rates were restored. It adopted a system of exclusive contracts with vessel owners by which, in consideration of their giving it all their towing and wrecking business throughout one or more seasons at all ports where it did business, it gave them a large discount from its tariff rates, with a guaranty that the contract rates, taken together, should not exceed the sum of the rates they might otherwise obtain by reason of the cutting of rates by competitors. By means of such contracts it obtained control of 90 per cent or more of the towing business at such ports, and, together with the other means stated, acquired [illegible] practical monopoly of such business. *Held*, that such compa[illegible]ontrolled companies were clearly organized and operat[illegible] and effect of securing a monopoly, and [illegible] in restraint of interstate

and foreign commerce in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 10, 12; Dec. Dig. §§ 12, 16.]

In Equity. Suit by the United States against the Great Lakes Towing Company and 51 other defendants. Hearing on pleadings and proofs. Decree for complainant.

U. G. Denman, U. S. Atty., of Cleveland, Ohio, and *E. P. Chamberlin*, Sp. Asst. U. S. Atty., of Bellefontaine, Ohio, for complainant.

Goulder, Day, White & Garry, and *Hoyt, Dustin, Kelley, McKeehan & Andrews*, all of Cleveland, Ohio (*Harvey D. Goulder* and *Hermon A. Kelley*, both of Cleveland, Ohio, of counsel), for defendants.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM.

The United States filed its petition in equity against the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, the Pittsburgh Steamship Company, and 46 other defendants, corporate and individual, charging the maintenance of a monopoly in transportation of persons and property in commerce between the States and with Canada, and a combination in restraint of such commerce, in violation of act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), known as the "Sherman Act." The specific monopoly and restraint charged relate to the business of vessel towing on the Great Lakes; the proofs being specially directed to the [785] harbors of Duluth, Sault Ste. Marie (Michigan), Port Huron, Detroit, Chicago (embracing South Chicago, Gary, Whiting, and Indiana Harbor), Toledo, Sandusky, Lorain, Cleveland, Fairport, Ashtabula, Conneaut, Erie, and Buffalo (including Tonawanda and Black Rock).

Previous to and in the year 1899 the towing into and out of the harbors mentioned of vessels engaged in commerce on the Great Lakes was done by independent tug or towing

companies, or individuals operating each at only one port, or, at most, at two or three ports in the immediate vicinity of each other. These tug operators were, generally speaking, in active competition with other operators (if any) at the same port, although competition was sometimes and in some places suspended by arrangements for operation on joint account, or for division of business. At Chicago were the Dunham Towing & Wrecking Company, with 17 tugs and a wrecking outfit, the Barry Bros. Towing Line, with 10 tugs, and the Hausler & Lutz Towing & Dock Company, with 3 tugs; at Buffalo, the Hand & Johnson Tug Line and the Maytham Tug Line, each with 7 tugs and a one-half ownership in a fifteenth tug; at Tonawanda were Hartman and others, with 5 tugs; at Erie and Conneaut, Ash and his associates, with 3 tugs; at Duluth, the White Line Towing Company, with 8 tugs, one lighter, and one scow, and the Inman Tug Company, with 8 tugs; at Cleveland, the Vessel Owners' Towing Company, with 10 tugs, the Cleveland Tug Company, with 5 tugs, and J. C. Gilchrist, 1 tug; at Toledo, Sullivan, usually with at least 8 tugs, and Nagle, with usually 3 tugs; at Ashtabula, the Ashtabula Tug Company, with 6 tugs; at Port Huron, the Thompson Towing & Wrecking Association, with 12 tugs and 3 lighters; at Bay City, James Davidson, with 2 tugs; at Huron, Dewhirst and others, with 2 tugs; at Fairport, the American Transportation Company, with 2 tugs; at Escanaba, the Escanaba Towing & Wrecking Company, one tug and wrecking appliances; at Sault Ste. Marie, Mich., the Soo River Lighter & Wrecking Company, with two lighters; at Detroit, the Westcott Wrecking Company, Limited, with one steamer, and the Isaac Watt Wrecking Company, Limited, with one steamer; at Cheboygan, the Swayne Wrecking Company, with one steamer. While the list above given is not absolutely complete, it is nearly so, and is sufficiently complete for present purposes.

In the spring of 1899 the Great Lakes Towing Syndicate was formed, for the purpose of acquiring towing and wrecking properties, a committee of this syndicate
to inspect, appraise, and take options on
The Great Lakes Towing Company was

1899, under the laws of New Jersey, with an authorized capital stock of $5,000,000, the first of the purposes stated in the certificate of incorporation being—

"to do a general towing, wrecking, salvage, dredging, and contracting business on the Great Lakes, in all the harbors thereof, and in all streams and waters tributary thereto or connected therewith, and elsewhere."

The promoters of this organization were largely, if not exclusively, persons heavily interested, directly or by representation, in transportation on the Great Lakes (notably of coal, oil, and ore); some being [736] interested in producing as well as in vessel owning and operating, others being interested in docking facilities. Through this syndicate, and on or before August 22, 1899, the Great Lakes Towing Company purchased the properties (in case of corporate vendors, their entire capital stocks or properties, or both) of the various tug owners and operators mentioned in the margin of this opinion,[1] these purchases embracing 74 tugs, 6 lighters, and 1 scow. The aggregate net purchase price paid for these properties, as indicated by journal entries on the books of the Great Lakes Towing Company, was $3,112,930.92, the vendors receiving, in cash value, much less than the prices so indicated, in many cases receiving preferred stock in whole or in part payment, and not usually any considerable amount of common stock, which latter carried the voting power; the control being held by the promoters and those having like interests. Later in 1899 and in the early part of 1900, the Great Lakes Towing Company bought the properties of still other tug owners, and operators, whose names are given in the margin,[2] such added

[1] The Maytham Tug Line, the Hand & Johnson Tug Line, Ash and others, Ashtabula Tug Company, Vessel Owners' Towing Company, Thompson Towing & Wrecking Association, Soo River Lighter & Wrecking Company, James Davidson, White Line Towing Company, Inman Tug Company, and Barry Bros., Independent Tug Line.

[2] The Cleveland Tug Company, the American Transportation Company, the Westcott Wrecking Company, Ltd. (whose name was thereupon changed to the Great Lakes Towing Company, Ltd.), the Dunham Towing & Wrecking Company, the Escanaba Towing & Wrecking Company, Dewhirst and others, Sault Ste. Marie Tug Company, Hartman and others, and Gilchrist.

Opinion of the Court.

purchases aggregating 34 tugs and 1 steamer. The Great Lakes Towing Company (which we shall hereafter call the Towing Company) thus immediately acquired all the properties of all the prominent towing operators at each of the 14 ports in question, except those of Nagle and Sullivan, at Toledo, and the two steamers of the Swayne and Isaac Watt Wrecking Companies, respectively. It will be seen that the control of these properties was soon afterwards acquired by the Towing Company, either by purchase or by contract.

The Union Towing & Wrecking Company was incorporated after the organization of the Great Lakes Towing Company, and was practically the successor of the Inman Tug Company and the White Line Tug Company, both of Duluth. It took over the properties of these two companies, as well as those of the Independent Towing Company, the Escanaba Towing & Wrecking Company, and the Soo River Lighter & Wrecking Company. The property of Barry Bros. (Chicago) was ultimately conveyed to the Dunham Towing & Wrecking Company. The properties of the Maytham Tug Line and one or more other companies were conveyed to the Hand & Johnson Tug Line. The properties operated at the lower lake ports were, for the most part, conveyed to the Great Lakes Towing Company, which also took, and has always held, the entire of the capital stock of the Hand & Johnson Tug Line, the Thompson Towing & Wrecking Association, the Union Towing & Wrecking Company, the Dunham Towing & Wrecking Company, and the Great Lakes Towing Company, Limited. All five [737] of these last-named companies have been kept alive, but the policy and activities of each of them, in all the ports in which they respectively do business, have at all times been absolutely controlled by the Great Lakes Towing Company, through boards of directors and otherwise. The other corporations [illegible] properties were bought by the Towing [illegible] treated as defunct, although they have [illegible]

[illegible] the purchases made by the [illegible] or subsequently, the ven- [illegible]

dors (and if corporate, usually their managers and principal stockholders as well) were required to and did agree in writing that during the succeeding five years they would "in all proper ways in their power, aid and assist the party of the second part (the Towing Company), its nominees, successors, and assigns, in retaining, extending, and successfully prosecuting the business" formerly conducted by the vendor; and that during the same period of five years they would not "directly or as shareholders, in or by or through any interest in any corporation, partnership, or association, engage in or be interested, directly or indirectly, in the business of *towing and wrecking* or in any branch thereof, *upon the Great Lakes*, their harbors, connecting, and tributary waters (except Lake Ontario and its harbors and the waters east thereof), excepting only and so far as they, or either of them, shall be interested in or with the party of the second part, as shareholder or employee." The Towing Company, at and within a few months following its organization, bought apparently more tugs than needed to do all the business required at the 14 ports, if properly distributed. Occasionally the Towing Company made sales of tugs, but always under agreement of the purchasers (and with attempt to make such agreement follow the title) that the tugs should not be used in vessel towing *at any of the 14 ports in question;* other ports as well being usually included in the restriction.

In 1900 Maytham's Towing & Wrecking Company was organized at Buffalo, and after a bitter and expensive competition with the Towing Company, its property, including 18 tugs, was in the following year bought by the Towing Company. Soon thereafter, and in 1901, the Independent Towing Company was organized at Buffalo, and after a long and aggressive competition (which in three months of 1903 cost the Towing Company $20,000, as compared with earnings in 1901) its property, likewise, was in 1903 bought by the Towing Company, and its manager taken into the latter's employ.

In connection with the purchase of the Independent Tug Company's property and business, an agreement was made with Sullivan for carrying on the towing business at Toledo

and in the Detroit and St. Clair Rivers on joint account, for a period of five years from January 1, 1904, each operator contributing an equal number of tugs, the business being conducted in the name of the Great Lakes Towing Company, with Sullivan as manager, under salary; the Towing Company agreeing not to do any other towing business at Toledo, and Sullivan agreeing not to do *any towing* except under the agreement in question, either alone or in association with others. This agreement was subsequently extended [738] to January 1, 1910. In April, 1904, an agreement was made with Nagle whereby, in consideration of a fixed payment of $2,000 per year for five years, he agreed that none of his three tugs should, during that period, be used "in vessel towing business on the Great Lakes, their harbors, tributary and connecting waters" (there being, however, no restriction upon Nagle's use of the tugs for other than towing business), Nagle calling this annual payment "alimony," and an officer of the Towing Company characterizing it as "blackmail." This payment of $2,000 per year was made to Nagle solely to get rid of his competition (without buying his tugs), and without the requirement of any active service. In 1905 an agreement was made with the owners of three tugs, whereby one or the other of two tugs named was to be used on joint account with the Towing Company in wrecking and other work in the vicinity of Detroit, the owners agreeing that the third tug (which was not included in the joint account operation) should during the life of the contract do no wrecking work or vessel towing in Detroit River or elsewhere, with the same restrictions as to the first and second tugs (except upon request of the Towing Company), when not employed under the contract; the towing of dredges or scows and the towing of vessels in Canadian ports other than Amherstberg (where the Towing Company did business) being excepted. Other contracts for joint operation were made, but they are less significant than those to which we have called attention.

As early as 1900 [illegible] ing Company adopted a tariff of service rates [illegible] few years after 1899 there was occasional [illegible] various of the ports where the

Towing Company operated. That at Buffalo has already been referred to. The Sullivan and Nagle arrangements grew out of competition at Toledo. At Duluth there was more or less competition as late as 1903, and at Chicago until 1905, and to a slight extent later. The record of correspondence between officers of the Towing Company and officers and managers of its subsidiaries from 1899 on abounds with expressions of determination to wipe out all injurious competition, and such policy was vigorously and aggressively pursued. Wherever rates were cut by competitors the cut was at least met. After competition ceased the rates were restored. We are not satisfied that the Towing Company started general rate cutting, and it may be that it did not cut below its competitors. Indeed, it would generally seem unnecessary that it should do so. Its policy, however, was "not to lose any business on account of not making the necessary rate to get it." Competitive practices were not limited to general rate cutting, but embraced special concessions in various forms, where necessary to get business away from the opposition.

The Towing Company adopted, as early as 1900, a system of exclusive contracts, by which, in consideration of the vessel owners employing *throughout the entire season* the Towing Company's *tug and wrecking service at all ports* covered by its tariffs (so far as the vessel owner had occasion for such service), a large discount was given from tariff rates. In 1910 a flat discount of 20 per cent was given on all bills. The discount was at no time less than 20 per cent, and in later years [739] it varied with the class of service, ranging in 1910 from 20 per cent on lake towing, boiler work, wrecking service, harbor towing of line boats and first-class coarse-freight carriers, to 30 per cent on lumber boats. No discounts were allowed except under such exclusive contracts. The vessel owner, moreover, was guaranteed that his contract rates, taken together, should not exceed the sum of the "cut rates" made to meet competition. As expressed by the Towing Company's president:

> [illegible]antage of the contract to the vessel owner is that it [illegible]0 per cent on the tariff at all points, and even though

Opinion of the Court.

by a corresponding increase in facilities for loading and unloading, through the substitution of the clam shell (and its predecessor, the scoop bucket) for the former slow method of raising by crane or derrick buckets filled by hand in the vessel's hold. Defendants contend that the towing and wrecking facilities furnished at the important ports on the Great Lakes were totally inadequate to meet this increase in the size and number of vessels; that while there were frequently tugs enough in commission, if they could be utilized, to meet the demands for harbor towing, at many of the ports a ruinous system of cut-throat competition existed, whereby the larger tugs were used for "scout service" in meeting vessels many miles from the harbor, leaving small and insufficient tugs to do the actual harbor towing, this resulting in lack of system for furnishing tugs, absence of system of delivering orders to ships, and of uniform system for notifying incoming vessels where they belonged, accompanied by graft, lack of fixed tariffs, and by other demoralizing incidents; that at times competing concerns made arrangements for division of business, whereby each tug line was to do all the towing of vessels belonging to certain owners, the latter having nothing to say as to what tugs should serve them; that many of the tug companies were financially irresponsible, and vessel owners were thus left without adequate remedy for negligent or unskillful towing; that before the formation of the Great Lakes Towing Company some of the larger vessel interests were considering forming individual tug lines for their own [741] service. It is also contended that the ice breaking tug service at the great grain ports of Duluth, Chicago, and Buffalo was inadequate. It is shown that, in the organization of the Great Lakes Towing Company, vessel owners contributed allotted amounts and took corresponding portions of stock, the vessel owners being expected to give their business to the new association; that the promoters tried first to buy out all tug operators at ports where bulk freighters did much business, instead of driving such operators out of business. It is also shown that the Towing Company has so increased the power and changed the construction of ice breaking tugs as to lengthen the

navigation period at the great grain ports by three weeks each year; that harbor towing service has been improved, delays largely eliminated, the delivering of orders systematized, and a responsible concern substituted for a number of concerns, some of whom were not responsible. Finally, it is urged that in the towing service a natural monopoly is impossible; that the organization of the Towing Company is practically a mere unification of the system of harbor towing, analogous to railway terminal service, and that in the absence of a natural monopoly such mere unification is not objectionable, the language of the decision in the St. Louis Terminal case being invoked as decisive of the legality of the Towing Company's status.

[1] The general propositions applicable to the facts presented are too well settled to justify much discussion. The Sherman Act in terms declares illegal every combination, in whatever form and of whatever nature, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679, and cases there cited. While by its later decisions the Supreme Court has interpreted the statute as not restraining the "power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose," and has declared that the words "restraint of trade" should be given a meaning which would not destroy the individual right of contract and render difficult, if not impossible, any movement of trade in interstate commerce, the free movement of which it was the purpose of the statute to protect (*Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663; *United States* v. *Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243), it may yet be regarded as well settled that a combination formed for the express purpose and with the express intent of eliminating natural and existing competition in interstate commerce,

and of monopolizing and restraining such interstate commerce, by the employment of unusual and abnormal methods of business, constitutes undue restraint or suppression, and so offends against the Anti-Trust act (Standard Oil Co., *supra;* American Tobacco Co., *supra;* Reading case, *supra*); and that a combination which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation whereby natural and existing competition in interstate **[742]** commerce is unduly restricted or suppressed, is within the condemnation of the act (Standard Oil Co. case, *supra;* American Tobacco Co. case, *supra*).

[2] We entertain no doubt that tugs employed in the business of towing into and out of harbors and between ports, of vessels engaged in interstate commerce, and in the lightering and wrecking of vessels so engaged, are themselves instrumentalities of interstate commerce. *Foster* v. *Davenport*, 63 U. S. (22 How.) 244, 16 L. Ed. 248; *Moran* v. *New Orleans*, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. Ed. 653; *Harmon* v. *Chicago*, 147 U. S. 396, 13 Sup. Ct. 306, 37 L. Ed. 216. It inevitably follows that any undue restraint upon such business of towing and wrecking offends against the Sherman Act.

[4] The intention of the Great Lakes Towing Company and its promoters to obtain complete control of the towing and wrecking service in at least the 14 ports mentioned is, we think, clearly established by the considerations to which we have referred. Referring to the more prominent of those considerations:

[3] While the sale of a business and the surrender of the good will pertaining thereto, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of a business, and not as a device to control commerce, is not within the Federal Anti-Trust Law (see authorities cited in *Darius Cole Transp. Co.* v. *White Star Line* [C. C. A. 6] 186 Fed. 63, 65, 108 C. C. A. 165), the imposition of a restraint greater than necessary to afford [illegible]tection to the legitimate interests of the purcha[illegible]

tractor, constitutes an unreasonable restraint under the Sherman Act. *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865. The fact that the restraint of competition was not limited to the locality where the seller was doing business, but was made to extend to *all harbors* upon the Great Lakes (except Lake Ontario), tends to show an intention on the part of the Towing Company to get more than reasonable protection incidental to the good will of the business sold. Likewise the restrictions upon competition imposed in the case of all the joint operating contracts referred to were greater than necessary for the protection of the Towing Company's legitimate business interests at the *local service* points covered by such contracts. No more effective method could well be devised for unifying the towing interests in question than by combining in one corporation the stocks of a large number of other corporations creating such a comparatively vast capitalization and influence. Such unification, unexplained, justifies a presumption of an intent to dominate and control the towing facilities. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. The fact that the policy of the Towing Company's promoters was to buy out competitors, rather than to buy new tugs, and by competition compel the loss to other tug owners of their property, does not tend to negative an intent to create a monopoly. Such course, as avoiding expensive competition, was entirely consistent with an intent exclusively to occupy the field. A [748] wicked purpose to wreck the property and business of those then engaged in towing is not essential to a violation of the statute.

The Towing Company's object in employing the system of customers' exclusive contracts was clearly to make successful competition impossible. As written by the Towing Company's president during the competition at Buffalo in 1903:

> "Some of the line managers, and a very large per cent of the vessel owners, have been induced to contract with this company, with the understanding that those who remained outside when the opposition was destroyed would have to pay the full tariff rates."

That these contracts greatly contributed to the suppression of competition is likewise clear. They enabled the Towing

Company to do each year a profitable business, despite competition at certain localities which would have been ruinous to an operator in that one locality, for rate cutting at one port did not affect the regular tariff rates at any of the other ports. As expressed by the Towing Company's secretary in 1900:

"As a matter of fact * * * these contracts are what are saving us from having the business entirely demoralized at all points."

It is true that the Towing Company has not attempted to do business on Lake Ontario or at any of the nearly 40 other harbors on the Great Lakes enumerated in the margin.[3] But this fact has nothing to do with the question of defendants' attempt to monopolize business at the 14 ports in question. It is not necessary to a violation of the Federal statute that a complete monopoly of all towing on the Great Lakes be effected. *Northern Securities Co. v. United States*, 193 U. S. 197, 332, 24 Sup. Ct. 436, 48 L. Ed. 679. A monopoly in 14 ports is as offensive against the act as a monopoly in 50 ports. We may remark, in passing, that we are satisfied that the business at none of the ports outside the 14 in question (unless it be Milwaukee) was such as to be attractive to the Towing Company.

We do not doubt that in 1899 the tug service, both towing and wrecking, at certain of the lake ports in question was unsatisfactory, although from the fact that no new tugs were built by the Towing Company for 7 years thereafter (and but four in 10 years) and no new lighters or wrecking appliances acquired during the first four years, it would appear that there was in 1899 no great dearth of tugs, or even of tugs of sufficient size, if properly employed. The question is whether the unsatisfactory towing facilities, including their practical operation, justified the making of

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[3] Two Harbors, Minnesota; Ft. William, Port Arthur, Michipicoten, Parry Sound, Depot Harbor, Midland, Collingwood, Owen Sound, Kincardine, [illegible], Port Dalhousie, Canada; Ontonagon, Houghton and [illegible], Gladstone, Cheboygan, Petoskey, Traverse City, [illegible] Ludington, Grand Haven, Holland, South Haven, [illegible] Saginaw, Bay City, Harbor Beach, [illegible] Two Rivers, Manitowoc, Sheboygan, [illegible] Kenosha, Wis. [illegible]

this combination. Of the claim that the Towing Company was merely a mutual protective association, it is enough to say that defendants' contentions in this regard are not sustained. Not all, or even nearly all, vessel owners needing the service [744] in question were included as (or even invited to become) members of the association. Nor can we assent to the suggestion that the combination was not organized for profit. The betterment of the service was unquestionably one of its attractive features, and probably the leading one; but we are satisfied the promoters confidently anticipated a profitable operation, and that but for such anticipation the combination would not have been formed. Cogent evidence of this conclusion is found in the declaration of the Towing Company's directors on August 16, 1899, that the properties proposed to be taken by the syndicate—

"had made net earnings which in the aggregate would pay a fair interest on $8,500,000 [much more than was proposed to be paid for the properties], which net earnings will undoubtedly be largely increased as a result of single management and of combined operation of the properties."

It is also to be noted that the officers reported to the stockholders in 1901 that the company had earned during the season of 1900, "in spite of a bitter competition" (principally the Maytham competition, it would seem), a net undivided profit of over $90,000, after paying 7 per cent on the preferred stock. The dividend was passed, however, so as to leave the company strong to meet such competition the next season. We are satisfied that the Towing Company's operations have proved financially profitable to its stockholders.

The fact that the towing and wrecking service has been improved under the Towing Company's administration cannot legalize the combination if otherwise unlawful. Not only do good motives furnish no defense to a violation of the Anti-Trust act (*Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107), but we have no right to assume that the unsatisfactory conditions existing in 1899 could not have been eliminated by lawful and normal methods.

Opinion of the Court.

Has the Towing Company acquired this domination of the towing and wrecking service by normal methods alone, or, as otherwise stated, has it unduly restrained or suppressed competition? We think it clear that the Towing Company's domination does not result from normal methods alone. Whatever may be the views of individual economists, under the Federal statutory policy normal and healthy competition is the law of trade; and such evils as may result from such competition must be considered less than those liable to follow a complete unification of interests and the power such unification gives. The evil of unification lies in the temptation to higher rates and lessened regard for the public interests; and the tendency to this evil result must be recognized, even though not in a given case yet realized in actual experience. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; *Joint Traffic Association case*, 171 U. S. 505, 576, 19 Sup. Ct. 25, 43 L. Ed. 259; *Standard Sanitary Mfg. Co.* v. *United States, supra.* Even competitive practices, of a nature which as between business rivals standing practically on equal terms may be normal and lawful, yet when employed by a powerful monopolistic combination with the ability to crush, and for the purpose of crushing, a weak rival, may become abnormal and unlawful. It needs no discussion to demonstrate that complete unification of the [745] towing and wrecking facilities at 14 principal ports, accompanied by restraints with respect to competition imposed upon the sellers of towing properties in excess of the legitimate protection necessary to the preservation of the business purchased, excessive restrictions against competition under joint operating contracts and on sales of tugs, bitter rate wars, and a system of exclusive contracts with customers such as is found here, all adopted or engaged in for the purpose of effectuating monopolistic control, are abnormal methods of doing business and eliminating competition, and that a restraint of natural competition by such means is [illegible] restraint. We think the *St. Louis Terminal case* [illegible] 307, 56 L. Ed. 810), so far from [illegible] the combination maintained by

the Towing Company, contains a direct denial of such legality. It was there held that the unification of substantially every terminal railroad facility by which the traffic of St. Louis is served constituted a combination in restraint of trade. It is true that the court, speaking through Mr Justice Lurton, there said:

> "It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact"

—the fact referred to being the "physical or topographical conditions peculiar to the locality"; the route exclusively occupied by the combination being the only practical route for entering the city. It was also held that the terminal was not under a "common control and ownership," because all needing its use were not admitted to an "equal control and management upon an equal basis with the present proprietary companies." To our minds there is a strong analogy between the "physical or topographical conditions" existing in the St. Louis Terminal case and the artificial condition created by the Towing Company. A prominent vice of the situation before us is that there are here involved 14 separate "terminals," no one "terminal" being allowed to stand by itself; that the towing facilities furnished at each "terminal" (speaking more especially with respect to prices) are not furnished to all on equal terms as respects the service at that "terminal," but discrimination is made for or against a customer according to whether he does or does not give the Towing Company all his business (not merely towing, but wrecking as well) at each of the other "terminals" covered by the Towing Company's tariffs. No more effective obstacle to successful competition could well be devised than is found in this exclusive contract system. It is manifest that no competitor doing business at less than all 14 of the ports could compete with the Towing Company on anything like equal terms. With the field already occupied by a strong

combination, with a large patronage fixedly secured through stockholding interests, the formation of another company equipped to do business at all 14 ports would seem a commercial and financial impossibility. The Towing Company seems to have ap[746]preciated this condition, for as early as April, 1900, its president wrote the local manager at Buffalo:

"I think you can safely assert that there is no one concern or combination of concerns that can carry out promises and take care of the vessel towing at all the ports all the time without at least 60 tugs. Taking all the tugs, outside our own, engaged in the vessel towing business, there is not one third of this number, including the poor ones, which are in a majority"

—and in August of that year, during the Maytham competition at Buffalo, the Towing Company's president did not believe that the Maythams, "notwithstanding their good reputation and conservative business principles," could "possibly induce capital to invest to the extent of $200,000." Yet several times that sum was paid on the very first purchase of towing facilities made by the Towing Company.

It is urged that all vessel owners already enjoy all the rights which by the decree in the St. Louis Terminal case were given outside railroads, in that all such vessel owners are at liberty to buy stock in the Towing Company, upon the market, and thereby participate in the ownership and management of that company's business. But all may not be able to acquire large stock interests, and the rights of minority stockholders may well fail to assure that "equal control and management upon an equal basis" with all other vessel owners, including the stockholders in the Towing Company, which would be necessary to make the relief analogous to that required in the Terminal case. We see, however, no substantial analogy in this respect between the vessel owners here and the railroads in the Terminal case. The analogy is rather between the railroads there and the tug companies here.

We conclude that the Towing Company and the corporations controlled by it constitute a combination denounced by the Anti-Trust Act. We thus come to the question of the

remedy to be applied. The general principles affecting this subject are that the continuation of the prohibited acts should be forbidden, and that the combination should be so dissolved as to neutralize the force of the unlawful power; that this result should be accomplished with as little injury as possible to the interests of the general public, and with due regard to vested property interests innocently acquired. In cases where the illegality of the combination results alone from purely administrative conditions, which may be effectively eliminated, a prohibition of the offending practices may be sufficient to vindicate the statute. *Standard Oil case, supra; St. Louis Terminal case, supra; Union Pacific R. R. case, supra.*

The complete elimination of the offending administrative practices to which attention has been called, including (as the more prominent) customers' exclusive contracts and destructive rate competition (especially as applied to temporary rate reductions in particular harbors), and including all unfair advantages possessed by the Towing Company by reason of its size, financial strength, or connections, accompanied by the according of equal and "most favored" treatment to all vessel owners, regardless of the amount of their business, and whether or not they are stockholders in the Towing Company, and whether or not they in fact exclusively patronize that company wherever it does [747] business (thus, and in all other ways, safeguarding the rights of all others engaged or wishing to engage in towing), would greatly lessen the presently existing evils, and possibly might substantially remove them. But, having in mind the magnitude of the combination and the extent of its activities, and the fact that it was organized to secure a monopoly, as well as for the benefit and profit of its members, together with its present practical occupancy of the territory, thereby placing all would-be competitors at such great disadvantage as practically to deter them, in large measure, from entering the field; together with the further fact that the decree of this court commanding the cessation of purely administrative practices would not be self-executing—it seems unlikely that a decree merely enjoining admin-

istrative practices would give complete relief, in the absence of radical change in fundamental principles upon which the Towing Company is organized and operated.

If the Towing Company shall present a feasible and satisfactory plan whereby its service shall be given for the equal benefit of all requiring the same (accompanied by a complete elimination of the offending administrative practices mentioned), so that the company becomes in truth "the bona fide agent and servant" of every vessel owner who shall use or need its facilities, and so that the rights of competitors are completely safeguarded, the injunction need only forbid continued operation except in full compliance with the terms of such plan; and the Towing Company is given 30 days for presenting such plan, if it cares to do so. Otherwise, the parties will be heard upon a plan for the dissolution of the combination, and upon the form of a decree for injunction, and receivership if necessary, to effectuate such dissolution. The question against what ones of the defendants injunction should issue is reserved until the precise form of relief is determined.

The proof does not show that the Pittsburgh Steamship Company has been a party to the combination charged, and counsel for complainant so concedes. As to that defendant the bill of complaint should be dismissed with costs.

No decree or order under this opinion will be entered until further directions.

UNITED STATES *v.* GREAT LAKES TOWING CO. ET AL.[a]

(District Court, N. D. Ohio, E. D. June 15, 1914.)

[217 Fed. Rep. 656.]

MONOPOLIES (§ 26)—ANTI-TRUST ACT—UNLAWFUL COMBINATIONS—EQUITABLE REMEDY.—The Sherman Anti-Trust Act, July 2, 1890 (26 Stat. 209, c 647 [U. S. Comp St. 1913, § 8820 et seq.]), section 4 of which alone relates to an equitable remedy for its violation, contains in terms no provision for equitable relief to the public, except

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[a] For prior opinion (208 Fed. 733), see *ante*, page 347. Case pending on appeal of the United States in the Supreme Court.

Statement of the Case.

by way of injunction or prohibition; and while the power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy as disclosed by the terms of the act is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate. The means to be employed to put an end to such a combination are governed by no uniform rule, but depend upon the facts of the particular case; and even where dissolution seems to be required to the furnishing of complete relief, such requirement does not necessarily amount to more than that the combination be dissolved so far as unlawful.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 26.]

MONOPOLIES (§ 26) — ANTI-TRUST ACT — SUIT AGAINST UNLAWFUL COMBINATION—RECEIVERSHIP.—While a receivership is proper, when necessary to effect the dissolution of a combination which is unlawful, as in violation of the Anti-Trust Act, it is not always necessary, even in such case, and when it is not it should not be resorted to.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 26.]

[657] MONOPOLIES (§ 26)—ANTI-TRUST ACT—SUIT TO RESTRAIN UNLAWFUL COMBINATION—NATURE OF RELIEF.—A towing company, which through purchases of the stock of other competing companies and the vessels of still other owners, acquired a large percentage of the tugs operating on the Great Lakes, was adjudged to have created a monopoly, in violation of the Anti-Trust Act by using unfair means to prevent competitors from doing business anywhere on the Lakes. *Held*, that the violation of the law did not consist in the ownership of the stock and vessels so acquired, but in the illegal method of doing business; that the remedy which would be most beneficial to the public was not a dissolution of the company through a receivership and sale of its vessels to a number of separate and independent purchasers, but a decree permitting it to continue business under proper and stringent injunctive regulations, which would eliminate the illegal practices and keep the way open for full and free competition.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 26.]

In Equity. Suit by the United States against the Great Lakes Towing Company and others. On settlement of decree for complainant.

U. G. Denman, U. S. Atty., of Cleveland, Ohio, and *E. P. Chamberlin*, Sp. Asst. U. S. Atty., of Bellefontaine, Ohio.

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[a] Syllabus copyrighted, 1914, 1915, by West Publishing Company.

Opinion of the Court.

Goulder, *Day*, *White & Garry* and *Hoyt*, *Dustin*, *Kelley*, *McKeehan & Andrews*, all of Cleveland, Ohio (*Harvey D. Goulder* and *Hermon A. Kelley*, both of Cleveland, Ohio, of counsel), for defendants.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM.

We reached the conclusion, upon final hearing, that the defendant, Great Lakes Towing Company, and the corporations which it controls, constitute a combination in violation of the Anti-Trust Act. 208 Fed. 733, 746.

The towing company was given opportunity to present, if it could, a feasible and satisfactory plan whereby the offending administrative practices mentioned in our opinion should be eliminated, and by which the towing company's services should be given for the equal benefit of all vessel owners needing its facilities, and the rights of competitors be completely safeguarded, in which case, we said, the injunction need only forbid continued operation except in compliance with the terms of such a plan. Otherwise, the parties were to be heard upon a plan of dissolution, with form of decree for injunction, and for receivership, if necessary, to effect dissolution. The towing company thereupon presented a plan which it was urged would conform to the suggestion of the court. The Government not only made specific criticisms upon various features of the suggested plan, but insisted that the combination could be effectively terminated only through a sale of the physical properties of the towing company, under direction of the court, through a receivership by which the company should be operated pending sale.

We indicated, by memorandum filed, that neither of the proposed plans was satisfactory, at least without important modificati[illegible] and gave opportunity for the presentation of furt[illegible] both by the [658] Government and the tow[illegible]mitting also certain questions on which [illegible] of counsel. The towing company still [illegible] substantially to the general plan

first presented by it, and has offered no plan of dissolution. The Government suggests no plan, except dissolution by way of sale of the towing company's assets, urging that as the only remedy, and to be effected only through receivership (in the absence of the towing company's consent to a plan of dissolution), modifying its former position only by suggesting that the plan provide for the distribution of the property and business of the towing company among such number of separate, distinct corporations, of divergent ownership, as may be necessary to restore competitive conditions.

[1] The Anti-Trust Act contains in terms no provision for equitable relief to the public on account of violations of the act, except by way of injunction or prohibition. Section 4, which alone relates to the equitable remedy, invests the appropriate courts with "jurisdiction to prevent and restrain violations of this act." It is made the duty of the district attorneys, under the direction of the Attorney General, to "institute proceedings in equity to prevent and restrain such violations." The prescribed prayer of the petition is that "such violations shall be enjoined or otherwise prohibited," and provision is made for "such temporary restraining order or prohibition as shall be deemed just in the premises." While the power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy, as disclosed by the terms of the act, is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate.

In *United States* v. *Freight Association*, 166 U. S. at page 343, 17 Sup. Ct. 560, 41 L. Ed. 1007, injunction is spoken of as "more efficient than any other civil remedy." In the *Reading case*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, the only relief given, aside from cancellation of the 65 per cent contracts, was injunctive. In *Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, none but injunctive relief seems to have been given. Moreover, where dissolution of an offending combination seems to be required to the furnishing of complete relief, such requirement does not necessarily amount to more than that

Opinion of the Court.

the combination be dissolved so far as unlawful; in other words, that the features which make it unlawful be eliminated by whatever means may be necessary therefor. For example:

In the *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, dissolution was accomplished by requiring such Securities Company to largely reduce its own stock, and in lieu of the stock so retired to distribute to its own stockholders a proportionate amount of the competitive stocks held by it. In the *Standard Oil case*, 223 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, the New Jersey corporation, which held the stocks of a large number of other corporations in exchange for its own, was required to distribute the stock so held among its own stockholders. In the *Tobacco case*, 221 U. S. 106, 31 Sup. Ct. **[659]** 632, 55 L. Ed. 663, the business was divided between four corporations; the controlling companies being again so sub-divided that business control was in the hands of a large number of separate corporations. Certain stock distributions were made, and injunctive relief given. In the *Union Pacific case*, 226 U. S. 470, 33 Sup. Ct. 162, 57 L. Ed. 306, dissolution was effected by the sale of the Southern Pacific stock. In the *Reading case* the unlawful combination was held to exist as to the Temple Iron Company and the 65 per cent contracts; and defendants were enjoined from voting the stock of the iron company, the contracts referred to were canceled, and their further execution enjoined. In the *St. Louis Terminal case*, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810, the unlawful condition was relieved against by such revamping of the conditions as that all the railroad companies could get the benefit of the terminal facilities on equal terms.

It is thus seen that, even where the remedy by injunction is thought to be inadequate, there is no uniform rule respecting the means to be employed in putting an end to the unlawful combination. Each case must stand upon its own facts; and methods adopted in other cases are not necessarily to be followed as precedents, except where the same

Union Pacific case, 226 U. S. 470,
L. Ed. 306.

Opinion of the Court.

[2] While receivership is clearly proper when necessary to effectuate dissolution (*Union Pacific case, supra; St. Louis Terminal case, supra*), it is not always necessary even in such case, and should not be resorted to except where necessary. In none of the Anti-Trust cases to which we have referred does there appear to have been actual receivership. The nearest approach to it is in the *Union Pacific case*, where a trustee was appointed to hold and transfer the stocks required to be disposed of.

The controlling inquiry thus is: What remedy promises the most effective measure of relief against the evils which we have found to exist?

[3] In the instant case, the evil to be remedied is not the ownership by the towing company of the corporate stocks of the Dunham and the Union Companies, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and the Great Lakes Towing Company, Limited. These companies were not substantial competitors. No good would result from distributing to the stockholders of the towing company the stocks of the five companies above enumerated, and the Government does not so request. Nor does the evil reside in the mere ownership of the corporate stocks, or physical properties, or both, bought from the other corporations or individuals. It is concededly impossible to restore to the sellers the properties so bought. The combination represented by the towing company violates the Sherman Act because it is a monopoly created by abnormal and unfair means, the most important of which are (*a*) the system of exclusive contracts by which vessel owners who employ throughout the entire season the towing company's tug and wrecking service, at all the ports covered by its tariffs (so far as the vessel owner had occa[660]sion for such service), receive a large discount from tariff rates, which is denied to all others; (*b*) the giving of special concessions, rebates, and discriminations to customers; (*c*) the restraint of competition by means of operating contracts, by unnecessary conditions imposed upon sellers of towing properties to buyers of tugs from the towing company; and (*d*) unfair rate wars, all adopted or engaged in for the

Opinion of the Court.

purpose of obtaining and effectuating monopolistic control. Unless for such means, purposes, and practices, the size alone of the combination, or the mere unification of the towing interests thereby brought about, would surely not justify putting the towing company entirely out of business.

Merely enjoining further operation by the towing company would injure, rather than benefit, the public by depriving it of the present service pending the reorganization of a new and sufficient service. A receivership, and operation thereunder until competitive conditions should be restored, without utilizing the towing company's property, would amount to a partial and unnecessary confiscation. We are thus left practically to a choice of two remedies: First, selling the towing company's properties to purchasers dissociated from the officers, directors, and stockholders of the towing company, with the expectation that operations will be carried on under a number of separate and independent ownerships, each confined to a given port or group of ports, and by receivership insuring a continuance of service pending sale and the ability to deliver the towing company's properties upon sale; or, second, to permit continued operation by the towing company only upon complete elimination of the offensive practices under which its monopoly has been created and maintained, and the imposition of such injunctive restrictions as will keep the way open for full and free competition. The towing company is before the court and subject to its injunctive processes, including punishment for disobedience thereto; and if we can impose upon that company prohibitions, susceptible of enforcement, which shall eliminate past abuses and remove obstacles to free competition, such course would provide the most effective relief available, and so would manifestly be for the public interest.

We do not overlook the Government's contention that a corporation which has, by improper practices, created a monopoly, will, if left in control, find means through indirect and secret methods to evade any injunctive restrictions which may be imposed. We also appreciate that the towing

company's present occupancy of the field places all prospective competitors at such disadvantage as in considerable measure to deter them from entering into competition. Nor do we fail to appreciate the insistence that this court cannot effectively superintend the conduct of the defendant's business. Indeed, in our former opinion we said that, for reasons there stated, it then seemed to us unlikely that a decree merely enjoining administrative practices would give complete relief, in the absence of radical change in the fundamental principles upon which the towing company was organized and operated, one of which reasons was the fact that a decree command[661]ing cessation of purely administrative practices would not be self-executing.

In spite, however, of these difficulties, we are convinced, after mature consideration, that continued operation by the towing company under proper and stringent injunctive regulations will, if obedience to such regulations can be adequately enforced through punishment for contempt, give better assurance of free competition and better public service than is promised by a division of the towing company's properties among several new ownerships. In reaching this conclusion we take into account the unsatisfactory history of the towing business previous to the organization of the Great Lakes Towing Company, the fair possibility of a recurrence of those conditions if the parties interested in the towing company's business are wholly excluded from the field and the new organizations released from all restraint by means of our decree, and the possibility of a renewal of the present monopoly through the reacquisition of the interests in the new organizations by those now interested in the towing company (which again would be released from the restraint of our decree), and the fact that under the plan we propose to adopt we shall have, if such plan can be enforced, the effect of 14 separate organizations, so far as concerns opportunities for competition and the avoidance of discriminations, and under the continued control of this court.

The plan we have adopted, not only includes the limitation contained in the plan presented by the towing company,

but in the extent and stringency of its provisions goes far beyond that plan. For example: The so-called "exclusive contracts" are forbidden, not only as affecting more than one port, but as applied to even one port; and such restrictions, as well as the towing company's tariffs, are made to apply to all classes of service given by that company. Stringent provisions against unfair rate cutting are also contained, and the provision against discriminations is practically unlimited. Again, we have sought to impose the general prohibitions contained in the Sherman Act, so far as applicable, as well as to apply the rules of the Interstate Commerce Act (act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1913, § 8563 et seq.]) as far as seems possible unless Congress shall include within the terms of that act corporations of the class of the towing company.

We see no reason to doubt that under the decree as drafted obedience to the injunctive process can be enforced, and disobedience thereto punished, without serious difficulty, for operation is expressly forbidden, except in strict compliance with the terms of the decree. Receivership and sale will, however, be resorted to in the event that the towing company shall not consent to be bound by the plan embodied in our decree.

The decree will be filed contemporaneously with this opinion, and notice thereof given by the clerk to counsel for all parties. It will not be entered until further order, nor until after the expiration of the time given the towing company to file the consent provided for by the sixth paragraph of the decree.

[662] Injunction is not by the decree filed herewith made to run against the Great Lakes Towing Company, Limited, because, perhaps by inadvertence, that company appears not to have been made a defendant. Opportunity should be given to bring it in, if desired.

Syllabus.

IRVING ET AL. v. JOINT DIST. COUNCIL OF NEW YORK AND VICINITY OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AND AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS OF AMERICA ET AL.[a]

THE CARPENTER CASE.

(Circuit Court, S. D. New York. July, 1910.)

[180 Fed. Rep., 896.]

WORDS AND PHRASES—"CLOSED SHOP."—A "closed shop" is one that employs union labor only.[b]

COURTS (§ 276)—FEDERAL JURISDICTION—WAIVER OF OBJECTIONS.—By appearing in a suit in the Federal Circuit Court, defendants waived any objection that the suit was not brought in the district where plaintiffs or they reside.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.]

COURTS (§ 315)—FEDERAL JURISDICTION—CITIZENSHIP.—A voluntary unincorporated association is not a citizen of any State, and hence the Federal Circuit Court has no jurisdiction of a labor union constituting such association, nor of its members generally, on a bill against them to enjoin interference with an employer's business.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.]

COURTS (§ 318)—FEDERAL JURISDICTION—DISMISSAL OF PARTY—EFFECT.—A bill in the Federal Circuit Court to enjoin interference with an employer's business may be dismissed as to a voluntary unincorporated labor union and its members generally, for want of jurisdiction of them, and stand as to the remaining individual defendants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 863; Dec. Dig. § 318.]

[897] INJUNCTION (§ 136)—PRELIMINARY INJUNCTION—PROOF REQUIRED.—On motion for a preliminary injunction, it is only necessary to show that a cause of action exists, and that irreparable injury will be done complainants unless they are protected.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.]

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[a] For opinion on final hearing (209 Fed. 471), see *post*, page 385.

Opinion of the Court.

TRADE UNIONS (§ 6)—RIGHTS OF PARTIES.—Workingmen have the right to unite to protect themselves and to strike peaceably for grievances, but not to threaten owners, builders, and architects that their contracts will be held up if they, or any of their subcontractors, use another employer's products.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 5; Dec. Dig. § 6.]

INJUNCTION (§ 163)—PRELIMINARY INJUNCTION—INTERFERENCE WITH EMPLOYERS.—On a bill to enjoin interference with an employer, an injunction is properly continued pending the action, restraining individual defendants from calling out employees in other trades who have no grievances against their employers and from notifying owners, builders, and architects and others that they are likely to have their operations suspended if they use complainant's products.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357–371; Dec. Dig. § 163.

Restraining boycotts, strikes, and other combinations by employes interfering with commerce or business, see note to *Shine* v. *Fox Bros. Mfg. Co.*, 86 C. C. A. 313.]

In Equity. Bill by Charles R. Irving and another, partners as Irving & Casson, against the Joint District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America and the Amalgamated Society of Carpenters and Joiners of America and others. On motion to continue a restraining order as a temporary injunction. Motion granted.

Walter Gordon Merritt, for complainants.

Charles Maitland Beattie and *William P. Maloney*, for defendants.

WARD, Circuit Judge.

This is a motion to continue in the form of a preliminary injunction a restraining order heretofore granted. It involves the question how far labor organizations, and their officers and members, can go to compel an employer of labor to maintain a closed shop; that is, to employ union labor only. Upon this argument the jurisdiction of the court is rested upon the difference of citizenship of the parties only.

The complainants are copartners, citizens of Massachu-
ndants are: (1) The Joint District Council
nity of the United Brotherhood of

Opinion of the Court.

Carpenters and Joiners of America and the Amalgamated Society of Carpenters and Joiners of America, and the members of said Joint District Council; (2) Edward H. Neal, as secretary of the Joint District Council and individually; (3) David French, Joseph Crimmins, L. E. Storey, Henry W. Blumenberg, Henry Erickson, William O'Grady, Frederick Dhuy, Harry Lea, Thomas Dalton, Frank Hellereith, George Lynch, August Nagel, James B. Smith, James Martin, Julian Wazeter, indi[898]vidually and as business agents of said Joint District Council; (4) Charles H. Bausher, individually and as business agent of the said Joint District Council, and as a member of the General Executive Board of the United Brotherhood of Carpenters and Joiners of America; (5) Frank Duffy, individually and as secretary of the United Brotherhood; (6) William D. Huber, individually and as president of the United Brotherhood. All of the individuals named are citizens of other States than Massachusetts and have been served with the subpœna by the United States marshal, except L. E. Storey, James Martin, and Julian Wazeter, citizens of New York, and Frank Duffy and William D. Huber, citizens of Indiana.

A demurrer, a plea, and an answer have been filed to the whole bill on behalf of all the defendants "other than the members of said Joint District Council," so that they are all before the court; Duffy and Huber, by appearing, having waived the objection that the action is brought neither in the district where the plaintiffs nor they themselves reside. Counsel for both parties wish a decision on the merits, and disclaim any disposition of the case on technicalities. Therefore, though the answer to the whole bill overrules the demurrer and the plea, I have considered all objections set up in the demurrer and plea, but shall mention only one I think good.

The defendants object that the Joint District Council, being a voluntary unincorporated association, is not a citizen of any State, and therefore the court has no jurisdiction of it or of its members generally. I think this objection good. *Chapman* v. *Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Taylor* v. *Weir*, 171 Fed. 636, 96 C. C. A.

Opinion of the Court.

438. The bill may be dismissed as to the Joint District Council and its members generally, and stand as to the other defendants, in accordance with the practice indicated in *Oxley Stave Co.* v. *Coopers' Union* (*C. C.*), 72 Fed. 695, affirmed 83 Fed. 912, 28 C. C. A. 99. There are intimations that service upon some of the members of such associations may be good as against the association and the other members in *United States* v. *Coal Dealers' Ass'n.* (*C. C.*), 85 Fed. 252; *American Steel & Wire Co.* v. *Wire Drawers' Unions 1 and 3* (*C. C.*), 90 Fed. 598; and *Evenson* v. *Spaulding*, 150 Fed. 517, 82 C. C. A. 263, 9 L. R. (N. S.) 904. If these cases mean more than that members of the associations not served may be held guilty of contempt if they knowingly assist in the violation of an injunction which has been granted, I am not disposed to follow them.

The particular grievance alleged in the bill may now be considered. The complainants are engaged in the manufacture of fine interior woodwork at East Cambridge, Mass., which they erect in place anywhere throughout the United States. They keep an open shop, employing union and non-union labor without discrimination. For this reason they are regarded as enemies by the Union Brotherhood. It has, and has long had, in the language of the defendants, a trade dispute with the complainants. The United Brotherhood is a voluntary unincorporated association having a membership of carpenters and joiners throughout the United States aggregating 185,000. These members are divided into local unions, which are also voluntary unincorporated associations and are represented by district councils, [899] composed of delegates from the local unions constituting the district. The members of the local unions are by virtue of that membership also members of the United Brotherhood and entitled to vote for delegates to its general conventions and for its general officers. The Joint District Council of New York and Vicinity consists of some 70 local unions of the United Brotherhood and of the Amalgamated Society of Carpenters and Joiners of America. There can be no question that these bodies constitute and are designed to constitute a combination of great power. The

bill alleges that this power is being unlawfully used against the complainants, in that on April 21, 1910, they having begun work under a contract for the woodwork of the Cathedral of St. John the Divine in this city, the defendant French, business agent of the Joint District Council of New York, ordered their men to quit work because this product was "unfair"—that is, the product of an open shop—and the men did quit work. April 22d the complainants' foreman, having called upon the defendant Crimmins, shop delegate of the Joint Council, was informed by him that the men could not go back until the complainants kept a union shop in Massachusetts. April 23d, in another interview with the defendant French, the complainants' foreman was told that if he put non-union work on the work at the cathedral, he (French) would pull out all the other trades working there. I have no doubt that this would have been done, nor is it denied in the affidavit submitted by the defendants. Thereupon the complainants obtained an order to show cause why a preliminary injunction should not be issued, and a restraining order in the meantime, which was granted.

For the purpose of showing the existence of the combination alleged in the bill, the complainants have referred to various incidents not connected with the particular charge relied on. September 26, 1906, Local Union No. 1,824, of Boston, presented a resolution to the meeting of the General Executive Board of the United Brotherhood, requesting that the complainants be placed upon the unfair list of the United Brotherhood. January 24, 1907, this request was denied, but the board requested all district councils, local unions, and members of the United Brotherhood to assist No. 1,824 by refusing to handle any material manufactured by the complainants. February 7, 1907, upon receiving additional information, the general president was instructed to notify members in districts where the complainants' trim is used "of the condition under which the trim is manufactured and the law of the United Brotherhood regarding the same." July 20, 1907, Local Union 1,824 presented to the convention of the United Brotherhood a reso-

lution reciting that, the strike of Local Union 1,824 against the complainants having run 14 months, it was recommended to the entire membership to refuse to handle any trim coming from them, which was adopted. January 23, 1908, Frank Duffy, general secretary of the United Brotherhood, wrote the following letter:

"I am in receipt of information from our district council in Boston to the effect that the firm of Irving & Casson, of that city, is figuring on the contract for the U. S. Armory School, at West Point, for which you are the architects. I desire to call your attention to the fact that the above-mentioned firm is **[900]** and has been for several years past unfair to organized labor, and our organization has been fighting said firm for some time. I would therefore ask that you do all in your power to have the contract for this job let to some fair concern. You will thereby aid us materially in our fight against Irving & Casson, and I am sure that anything you may do along the lines suggested will be appreciated."

July 14, 1908, he also wrote the following letter:

"I am in receipt of information to the effect that you have the contract for a large residence in Brookline, the owner of which is ex-Governor Powers, of Maine, and that the firm of Irving & Casson is figuring on the interior trim for said job. I am therefore writing to inform you that this firm is now and has been for some time past one of our greatest enemies, having absolutely refused on more than one occasion to pay our members union wages and work them union hours. It is only natural, therefore, that we should wish to have the work given to some firm which is fair to the members of our organization, and I would therefore request that you use your influence in having the contract for the interior woodwork on this job let to such a firm. I can assure you that anything you may do for us along this line will be thoroughly appreciated. Thanking you in advance for your kind attention in this matter, I am respectfully yours."

Instances are set out in the complainants' affidavits in which they have lost business because of notifications coming from the combination. Although their bid was satisfactory in the case of the Fifth Avenue Building, on the corner of Twenty-third Street and Fifth Avenue, the architect refused to accept it because he feared labor complications likely to result from their keeping an open shop. A similar thing occurred in connection with estimates on wood finishing for the Church of St. Bartholomew. Other cases

in which the complainants were interfered with arose in connection with a contract made in Bristol, Conn., in March, 1909, and in connection with the building of the Second National Bank, at Twenty-eighth Street and Fifth Avenue, in the fall of 1908, and in connection with the house of H. H. Beard, Sixty-eighth Street and Madison Avenue, in 1907, and with the Gainsborough Studio in the fall of 1908, and with the house of A. L. Stirn at Stapleton, Staten Island, in the summer of 1908.

Without meeting these instances of interferences categorically, the defendants object that they are stated upon hearsay and lack precision. No doubt more and better evidence would be required on final hearing, but all that is needed upon a motion for a preliminary injunction is to satisfy that a cause of action exists and that irreparable injury will be done the complainants unless they are protected. In such a case a preliminary injunction ought to issue.

The right of workingmen to unite for their own protection is undoubted, and so is their right to strike peaceably because of grievances; but their right to combine for the purpose of calling out the workmen of other employers who have no grievances, or to threaten owners, builders, and architects that their contracts will be held up if they or any of their sub-contractors use the complainants' trim is quite another affair. To take the converse of the proposition: Will the defendants admit that employers may combine to prevent any employer from using union labor? May the employers agree not to sell to or contract with anyone who deals with an employer who uses union labor?

[901] Either of these propositions is destructive of the right of free men to labor for or to employ the labor of anyone the laborer or the employer wishes. See the language of Justice Harlan in *Adair* v. *United States*, 208 U. S. 161, 174, 28 Sup. Ct. 277, 52 L. Ed. 436. If the struggle is persisted in between labor and capital to establish a contrary view, ultimately either the workmen or the employers will be reduced to a condition of involuntary servitude.

Opinion of the Court.

Whether the complainants do a large business or, as the defendants allege, a small business, there is no doubt that the defendants, by combination between themselves and with others, have determined to force them against their will to maintain a closed shop in Massachusetts or go out of business and to compel all persons in their employment, whether they will or not, to become members of the union or lose their employment. Of certain suggestions in the defendants' papers that the complainants are seeking to prevent the workingmen from organizing and striking and from communicating with each other, it may be said in the words of Brown, J., in the Supreme Court of Pennsylvania, in *Purvis* v. *Local No. 500, United Brotherhood of Carpenters and Joiners*, 214 Pa. 348, 353, 63 Atl. 585, 586, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757:

"The zeal of counsel may account for, but can hardly excuse, the statement in appellants' paper book of the questions involved on this appeal. They are there stated to be: 'Is the dissemination by means of printed notices by a lawfully constituted lodge of union laborers to its members and employers of labor, of its adopted rules by virtue of its constitution forbidding its members to work non-union material, an unlawful conspiracy? Is it lawful by peaceful means to make effective such rules?' From an examination of the averments of plaintiffs' bill, the ample proofs submitted in support of them, and of the facts found by the court below, it is most manifest that the only question before us is whether the appellants were properly enjoined from injuring and destroying the business of the appellees, in pursuance of a conspiracy to do so, as a penalty for their refusal to unionize their mill. This would mean to the appellees, as they aver, that they would be compelled to employ only union workmen, and to yield their free and unrestricted right to select their own employees in the conduct of their business; that they would be compelled to submit themselves to the control of the union, and to put themselves within its power to dictate to them the number of hours to constitute a day's work in their mill, the compensation to be paid therefor, the time of payment thereof, and the selection of their employees. It would be a recognition of the power of the agents of the union to practically control their business."

The particular acts sought to be enjoined in this case are the calling out of the employees in other trades, who have no grievance against their employers, and the noti-
›n of owners, builders, architects, and third persons

Syllabus.

that they are likely to have their operations held up if they use the complainants' trim. Whether the complainants may be found to have other rights on final hearing, and whether persons not parties may be guilty of contempt if they knowingly assist in the violation of the preliminary injunction to be issued, need not now be considered.

Motion granted, with leave to the parties to submit within one week forms of order which they respectively think appropriate under this opinion.

IRVING ET AL v. NEAL ET AL.[a]

(District Court, S. D. New York. November 6, 1913.)

[209 Fed. Rep., 471.]

CORPORATIONS (§ 370)—PRACTICING LAW—NEW YORK STATUTE.—Penal Law (Laws N. Y. 1909, c. 88 [Consol. Laws N. Y. 1909, c. 40]) § 280, which prohibits any corporation from practicing law, does not make it unlawful for a corporation to prosecute an action for the benefit of another at its own expense, employing members of the bar to conduct the case.[b]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511–1518; Dec. Dig. § 370.]

TRADE UNIONS (§ 4)—LIABILITY OF MEMBERS—COMBINATION IN RESTRAINT OF TRADE.—A member and officer of a labor organization, who joins with others in the adoption of a rule or regulation which is made a part of the organic law of the organization and binding on all its members under penalty of a fine, if such rule or regulation is unlawful as in restraint of trade, is liable for anything done to carry it out, although he does not personally participate therein.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 3; Dec. Dig. §4.]

MONOPOLIES (§ 12)—COMBINATIONS IN RESTRAINT OF TRADE—REGULATIONS OF LABOR ORGANIZATIONS.—A combination between local unions of organizations of carpenters and joiners, by which their members are pledged to refuse to work on any job where trim or finish made in a non-union shop is used, is in restraint of trade and commerce, and, if it affects interstate commerce, is in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp.

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[a] For opinion on motion for a temporary injunction (180 Fed. 896), see *ante*, page 377.

Opinion of the Court.

St. 1901, p. 3200), and it is immaterial that the combination is not directed against any particular concern or dictated by any malicious motive.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 24)—COMBINATIONS IN RESTRAINT OF TRADE—STATUTORY REMEDIES.—Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prescribes the remedies for its violation, civil and criminal, at law and in equity, and under its provisions injunctive relief can be given only at suit of the Government. Nor can such relief be granted under section 340 of the General Business Law of New York (Consol. Laws N. Y. 1909, c. 20) against a combination in restraint of competition in trade in violation of its provisions except at suit of the State.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MONOPOLIES (§ 24)—COMBINATION IN RESTRAINT OF TRADE—INJUNCTION.—Under Penal Law N. Y. (Consol. Laws N. Y. 1909, c. 40) § 580, subd. 6, which makes it a misdemeanor for two or more persons to combine to commit any act injurious to trade or commerce, but makes no provision for civil remedies, any appropriate remedy is available to one specially and directly injured by its violation who may, where the combination affects his business, obtain relief by injunction.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

In Equity. Suit by Charles R. Irving and Robert Casson, copartners doing business as Irving & Casson, against Edward H. Neal, individually and as secretary of the Joint District Council of New York and [472] Vicinity of the United Brotherhood of Carpenters and Joiners of America and Amalgamated Society of Carpenters and Joiners of America, and others. On final hearing. Decree for complainants.

See, also, 180 Fed. 896.

Walter Gordon Merritt, of New York City, for complainants.

Charles Maitland Beattie, of New York City (*William P. Maloney*, of New York City, of counsel), for defendants.

WARD, Circuit Judge.

On April 30, 1910, this suit was brought by the complainants, citizens of Massachusetts, against the Joint District

Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America and Amalgamated Society of Carpenters and Joiners of America, which joint council is a voluntary unincorporated association, and also against certain individuals who were members of the United Brotherhood and all of whom were either officers of the Joint District Council or of the United Brotherhood. Jurisdiction depends upon citizenship. The bill has been dismissed against the Joint District Council because it is a voluntary association and not a citizen of any State, but sustained against the other defendants connected with the Joint District Council because they are citizens of New York, and against the two remaining individual defendants, officers of the United Brotherhood of Carpenters and Joiners of America, who, although citizens of Indiana, have voluntarily appeared. 180 Fed. 896.

The bill alleges that the United Brotherhood is an unincorporated association, having affiliated with it over 1,900 local unions, composed of carpenters and joiners, aggregating some 170,000 members in the United States; that there are 70 of these local unions within the limits of the city of Greater New York, which, with certain branches of the Amalgamated Society of Carpenters and Joiners of America, have formed the Joint District Council of New York City and Vicinity, composed of delegates from the local unions and branches aforesaid; that this Joint District Council has power, under the rules of the United Brotherhood, to adopt regulations concerning strikes and the use of any material which it declares "unfair"; that it has made rules giving the business agents authority to call strikes, and has provided a penalty of $10 against any member who works on "unfair" trim—that is, woodwork made in a non-union shop.

The bill then alleges that the complainants carry on an open shop for manufacturing fine interior woodwork or trim, in Massachusetts, and that the United Brotherhood, the Joint District Council, and the other defendants have entered into a combination to destroy their business and to prevent them from selling or installing their trim outside

of Massachusetts until they operate their mill in Massachusetts as a closed or union shop; that, in pursuance of such conspiracy, the defendants have, among other things, put the complainants on "unfair" lists distributed to builders, architects, and owners, and have omitted their names from lists of "fair" shops circulated in the same manner, together with a letter saying that the employment of these shops will avoid labor troubles; have written letters to builders, architects, and [473] owners asking them not to contract with the complainants because they are an "unfair" concern; have threatened and called strikes of various trades working upon buildings where the complainants' trim was being installed.

The prayer for relief is as follows:

"That the defendants * * * be restrained and enjoined from conspiring, agreeing, or combining in any manner to restrain, obstruct, interfere with, or destroy the business of the complainants, and from interfering in any manner with the complainants obtaining orders or contracts for work or materials or interfering in any manner with the sale or disposition of the product of the complainants' factory, or the installation or setting of any of the product of the complainants' factory upon any building or buildings, and from publishing, circulating, or otherwise communicating either directly or indirectly in writing or orally to each other or to any other person, firm, or corporation any statement or notice of any kind or character whatsoever calling attention to the fact that your complainants or their business or their products are or were or have been declared unfair or are on any unfair list, or that your complainants should not be patronized or dealt with or their products purchased, used, handled, worked upon, or dealt in because made in an open or non-union shop, and from publishing, circulating, or communicating either orally or in writing any representation or statement of like effect or import for the purpose of injuring or interfering with or tending to injure or interfere with the complainants' business or with the free and unrestricted right of the complainants to dispose of their product and to obtain contracts for work to be performed or orders or contracts for merchandise to be made, installed, or set by them, and from giving notice verbally or in writing to any person, firm, or corporation to refrain from soliciting, making, or carrying out contracts with complainants for services to be performed or merchandise to be made, or to refrain [illegible] chasing or attempting to purchase materials of any [illegible] ts under threats that if such contracts or [illegible] arried out they will cause the per- [illegible] that they will cause persons in the

employ of said persons so notified to withdraw from their employment, or that they will cause persons employed by others upon buildings where said persons so notified are doing work to withdraw from all work upon said building, and from inducing or attempting to induce any person or persons whomsoever to decline employment or cease employment or not to seek employment under any person, firm, or corporation because such persons, firm, or corporation may have made contracts or purposed to make contracts with complainants or may have purchased or purposed to purchase materials from the complainants, or because materials furnished by the plaintiff were being used on or in connection with some building where said persons were doing work, and from in any way inducing or attempting to induce any person or persons to refuse to install or work upon materials manufactured by your complainants, and from enforcing or attempting to enforce or threatening to inflict any injury, loss, penalty, or liability, whether in the nature of a fine, or suspension, or expulsion from any labor organization or otherwise against any person who works for your complainants or upon materials furnished by your complainants, or against any person who works for any employer who purchases materials from your complainants, or against any person who works upon any building where the materials of complainants are being installed or are about to be installed, and from making, communicating, or circulating any statement orally or in writing that the defendant or members of any union or workingmen will refuse to work upon any materials unless said materials are constructed under strict union conditions, and from requesting customers, or those who might become customers, of the complainants, to purchase their wood materials from or have their woodwork done by persons or corporations who use the union label of the United Brotherhood of Carpenters and Joiners of America or who operate their factories according to the rules and regulations of said Brotherhood, so that no controversy or difficulty can arise on account of non-union woodwork, and from using said label to obstruct and interfere [474] with the complainants' business and from combining, conspiring, and confederating together to refuse to work upon materials unless they are made under strict union conditions, and from publishing, circulating, enforcing, and attempting to enforce the provisions of section 52-C of the by-laws of the District Council of New York and vicinity, which is as follows:

"'Any member proven guilty of using the product of any person, firm, or mill who have been declared unfair by their district council, or working for any person, firm, or mill who have thus been declared unfair shall be fined ten dollars ($10) for each offence.'

"And from publishing, circulating, enforcing, and attempting to enforce section 78 of the by-laws of the District Council of New York and Vicinity, which is as follows:

"'Any person of this United Brotherhood who is required to put up material not bearing this union label (meaning the carpenters'

Opinion of the Court.

label) shall forthwith report the facts to the business agent in writing. Failing to do so he shall be fined.'

"And from using any and all ways, means, and methods of doing any of the aforesaid forbidden acts and from doing any of the forbidden acts either directly or indirectly or through by-laws, orders, directions, or suggestions to committees, associations, officers, agents, or others."

The defendants in their amended answer admit that the members of the United Brotherhood have bound themselves to work only on union trim, and that those represented by the Joint District Council are subject to a fine of $10 if they knowingly do so. Articles tenth and eleventh are as follows:

"Tenth. That it is true that under the rules of the United Brotherhood its members have bound themselves, without thought of and probably without knowing of the existence of the plaintiffs, to work only under union conditions which established certain wages and hours, and to work only on the products of mills running under union conditions. That there are several thousand mills in this country, several hundreds of which are larger than the plaintiffs', and of all said thousands of mills probably not more than half are union. That there is no more reason for the defendants to refuse to work on the products of plaintiffs' mill than on many hundreds of other non-union mills, the sole reason being that plaintiffs' mill is non-union, and there never has been a conspiracy to act against their mill on the part of the defendants, there could be no such conspiracy against them under the circumstances among the approximate 200,000 members of the Brotherhood of Carpenters, and the allegations to the effect that their mill, among the many hundreds of other non-union mills, has been selected to conspire against are untrue and without reason. Whenever the members of the Brotherhood of Carpenters find that they are required to work non-union products of any mill, they cease under their contract or rules of membership to work upon such products, and, if they knowingly work on any non-union products, they are subject, as stated in said complaint, to be fined $10, but these defendants know of no case where a member has been fined for working on the products of these plaintiffs, which they believe to be due to the plaintiffs employing non-union men, or that members worked thereon without it being disclosed to them that said millwork was non-union.

"Eleventh. That prior to all the times complained of in the complaint many of the large contracting employers of labor at the city of New York in the building line had united with different organizations of labor in what is known as the arbitration agreement for ustment of all differences among them, and said contracting

employers and the Brotherhood of Carpenters of this city had their separate trade agreement for their mutual interests of arbitration and to prevent strikes and lockouts, to fix wages and hours of the journeymen, and provide for union conditions. That in and by said trade agreement said journeymen carpenters are not to work on non-union products of mills, but there is no discrimination against any one mill. They further allege, on information and belief, that the plaintiffs from time [475] to time, well knowing of these arbitration and trade agreements, have sought to have these particular employers under these said agreements and members of the Brotherhood and Amalgamated Carpenters put up and install the products of their non-union mill without disclosing to either parties to said arbitration and trade agreements that the said products were non-union. That the effect of the injunction asked for herein would be to destroy said arbitration and trade agreements and reduce said city to the chaos of lockouts and strikes which has at times existed in the building trades, and compel these union men to handle the cheap products of hundreds of non-union mills all over the country, and would further destroy the business of many union mills in this State which pay higher and union wages commensurate to the higher cost of living here. That under the decisions of the highest courts of this State and district as they are advised, they are not required to handle the products of non-union mills, so that an injunction which can only be given in the Federal courts to non-residents—the diversity of citizenship only giving jurisdiction—would have the effect of compelling them to handle the products of the non-union mills of residents of other States, and would so discriminate against mills of this State."

The particular case of a sympathetic strike threatened by the defendant Blumenberg, a business agent of the Joint District Council at the Cathedral of St. John the Divine in this city, resulted in the issuance of a restraining order and preliminary injunction prohibiting the individual defendants, both individually and officially, from interfering with the complainant's business. The case now comes up on final hearing.

[1] The defendants make a preliminary objection that the bill must be dismissed because the cause has been conducted at the expense of the American Anti-Boycott Association, and by lawyers paid by it in violation of section 280 of the Penal Law (Consol. Laws N. Y. 1909, c. 40). Assuming that this section applies, I do not think that the complainants' cause of action is affected in any way. If the Anti-Boycott Association were the owner of the claim, re-

lief might be denied it. Matter of Bensel, 68 Misc. Rep. 70, 124 N. Y. Supp. 726. But the only connection the association has with the claim is to prosecute it for the benefit of the complainants at its own expense. Exactly the same thing is being done for the defendants by the United Brotherhood and Joint District Council. The attorneys who conduct the case on behalf of the complainants are qualified to practice at the bar of the court, so that such cases as *Kaplan* v. *Berman*, 37 Misc. Rep. 502, 75 N. Y. Supp. 1002, do not apply.

[2] I find that the allegations of the bill as to particular instances in which the purpose of the combination was carried out or sought to be carried out against the complainants are true as matter of fact. The defendants contend that, even if this be so, the bill should be dismissed as without equity against them because they have not individually published "unfair" lists or called or threatened sympathetic strikes, and further because no "unfair" lists have been published or sympathetic strikes called for the past two years. They are, however, members of the United Brotherhood and of the local unions represented by the Joint District Council and are officers either of the brotherhood or council. Several of them did actually take part in some of the particular instances stated in the bill. At all events, if the thing principally complained of, viz, an agreement not to work on non-union trim [476] enforceable by fine is unlawful, they are liable for anything done to carry it out, even though they did not individually participate. The agreement is a part of the organic law of the associations of which they are members and officers, and, of course, they cannot say they are ignorant of it or do not participate. The admissions of their answer are to the contrary. I think this proposition consistent with the opinion of the Circuit Court of Appeals for this circuit in *Lawlor* v. *Loewe*, 187 Fed. 522, 109 C. C. A. 288. So also, assuming that the acts [illegible] ained of in the bill or some of them have been dis-[illegible] d. further commission of them may be properly en-[illegible] are unlawful.

[illegible] be no question: First, that a combination [illegible] cal unions which consti-

tute the United Brotherhood; second, that one of the purposes of the combination is to compel the unionization of all manufacturing carpenter shops; third, that the object is to restrain competition between open shops and union shops; and, fourth, that this object is to be accomplished principally by an agreement to refuse to work on any job where non-union trim is used. It further appears that an agreement exists between the Master Carpenters Association, composed of the principal employers of carpenters in Greater New York, and the Joint District Council, whereby the builders agree to use only union trim, which I think the builders were coerced into making by the unions. The effect of it is that non-union trim, except of negligible sizes, cannot be sold throughout almost the whole of that territory.

It is said that workmen have a right to refuse to work for any reason they choose, good or bad, which is satisfactory to themselves. This is true, but it does not follow that they have a right to combine to do so some 200,000 strong over the whole country. Doubtless the purpose of the combination is to advance their own interests without actual malice against manufacturers who do not wish to operate their mills in accordance with the requirements of the unions. This, however, is true of almost every combination in restraint of trade. The combination in this case results all the same in directly restraining competition between manufacturers.

The precise question of law to be determined is whether this feature of the combination, there being no right of action at common law, is made unlawful by and may be enjoined under any statute.

[4] I think it is shown to be unlawful under the Sherman Law by the decision of the Supreme Court in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. In that case the United Hatters of North America, composed of some 9,000 members, associated with other labor unions as the American Federation of Labor, aggregating more than 1,000,000 members, combined to unionize all factories in which the United Hatters worked

Opinion of the Court.

The particular party proceeded against was Lawlor & Co., not for the purpose of restraining interstate commerce, nor out of any hostility to that particular concern, but entirely for the purpose of benefiting the United Hatters. Yet the method of enforcing the combination was held unlawful under the Sherman Law because it resulted directly in restraining interstate commerce. I think the mere agreement of the local unions [477] throughout the United States in this case not to work on non-union trim necessarily and directly restrains interstate commerce in the same way and is therefore unlawful. But because the Sherman Law prescribes the remedies, both criminal and civil, at law and in equity, it is held in this circuit that only the prescribed remedies can be pursued. From this it follows that the injunctive relief can only be had at the instance of the Government, and therefore that the complainants cannot recover. *National Fireproofing Co.* v. *Mason Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

Section 340 of the General Business Law of this State (Consol. Laws 1909, c. 20) makes any combination, whereby competition in the supply or the price of any article in common use in the State is restrained, a misdemeanor. Interior trim such as the complainants manufacture is such an article; but, as the law confers the remedy by injunction on the State and elaborately prescribes the procedure, I am bound to follow the suggestion made in the National Fireproofing case, *supra*, that under this act also injunctive relief can be had only at the suit of the State.

[5] Section 580 of the Penal Law of this State, subd. 6, makes it a misdemeanor for two or more persons to conspire to commit any act "injurious to trade or commerce." Without discussing the multitude of decisions cited by counsel, the reasoning in the case of *Loewe* v. *Lawlor*, *supra*, seems to me enough to show that the combination in this case is such an act. See, also, *People* v. *McFarlin*, 43 Misc. Rep. 591, 89 N. Y. Supp. 527. As the act says nothing whatever about civil remedies, I think any appropriate remedy is available to one especially injured by violation of it.

This was the view of the Court of Appeals in *Cranford* v. *Tyrrell*, 128 N [illegible] 344, 28 N. E. 514, 515, an action to

restrain defendant from keeping a house of ill fame, made a misdemeanor by section 322 of the Penal Code. So far as this was a common nuisance, it was for the public authorities to suppress it, and the defendant contended that the plaintiff could not maintain a civil action. Judge Gray said:

"If the business complained of is a lawful one, the legal question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnoxious and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit, or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner. The principle has been long settled that the objection that the nuisance was a common one is not available, if it be shown that special damage was suffered. Rose v. Miles, 4 M. & S. 101; Rose v. Groves, 5 Man. & G. 613; Francis v. Schoellkopf, *supra* [53 N. Y. 152]; Lansing v. Smith, 4 Wend. [N. Y.] 9 [21 Am. Dec. 89]. * * *

"In the present case the indecent conduct of the occupants of the defendant's house and the noise therefrom, inasmuch as they rendered the plaintiffs' house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action. If it was a nuisance which affected the general neighborhood and was the subject of an [478] indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for an injury sustained and to their equitable right to have its continuance restrained."

This case was cited with approval in Re Debs, 158 U. S. 564, at page 593, 15 Sup. Ct. 900, 909 (39 L. Ed. 1092); Mr. Justice Brewer saying:

"Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive power of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. Thus, in *Cranford* v. *Tyrrell*, 128 N. Y. 341, on page 344 [28 N. E. 514, 515],

an injunction to restrain the defendant from keeping a house of ill fame was sustained; the court saying: 'That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner.' And in *Mobile* v. *Louisville & Nashville Railroad*, 84 Ala. 115, 126 [4 South. 106, 112 (5 Am. St. Rep. 342)], is a similar declaration in these words: 'The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights.'

"The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offenses which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction."

Finally, there remains to inquire whether the decision in the National Fireproofing case will prevent the complainants from recovering. In that case the Circut Court of Appeals held that the combination complained of was not a violation either of the Sherman Law or of the General Business Law of this State, and then went on to consider whether it was a conspiracy at common law maliciously to injure the complainant which would give it a right of action. The particular provision attacked was the agreement between the Master Builders and the Bricklayers' Union, forbidding the sub-letting of fireproofing. The court held that, this provision being for the benefit of the bricklayers, and not being maliciously aimed at the complainant, it had no right to recover. Indeed, the complainant was not directly, but only incidentally, injured. If its charter had authorized it to con- of buildings, it would have been under ver. The New York market was uld contract only for the erection ntract for which was forbidden held that the object of

the [479] agreement being lawful, and the means taken to enforce it lawful, the complainant, although injured, had no cause for action. For the same reasons the court held that the combination did not violate the Penal Code, § 168, subd. 6, which is the same as the section of the Penal Law now under consideration. I think the difference between that case and this clear. In this there is a combination to do an act made unlawful by statute and punishable as a misdemeanor which has, at least in certain instances, been enforced against the complainants by unlawful means.

The decision of the Court of Appeals in *Kellogg* v. *Sowerby*, 190 N. Y. 370, 83 N. E. 47, does cause doubt. It was a civil action for damages, the plaintiffs charging the defendants with combining to prevent them from using their elevator or competing in the business of elevating grain. The Court of Appeals held that, although the agreement was a conspiracy in violation of the statute, the defendants should have been allowed to show at the trial that when they entered into the combination they supposed the plaintiffs were also going to enter into it, because this would prove that they did not by the combination intend to injure the plaintiffs, in which case the plaintiffs could not recover.

This seems to be treating a conspiracy in violation of statute as if it were a combination at common law to restrain trade or prevent competition without malice to the plaintiffs. Of such a combination, although not valid nor enforceable between the parties, no third party could complain at common law, unless it was made maliciously to injure him. *Mogul S. S. Co.* v. *McGregor* (1892) App. Cas. 25. But under the statute in question the offense is a misdemeanor, and it makes no difference what the intention of the parties to the agreement was, and so the court said, in the Kellogg case:

"The error committed in the exclusion of this evidence requires a reversal of the judgment. In order to guard against any possible misapprehension, however, on another trial, it is proper to say that we do not think that good motives on the part of those who enter into a combination in restraint of trade save it from the condemnation of the law of this State. *People* v. *Sheldon*, *supra* [139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690]. The fact that the parties to an agreement of such a character may have

Syllabus.

honestly believed that it would be beneficial instead of injurious to commerce does not render it legal. The law denounces it if it is designed to prevent competition and will have that effect whatever the intent of the parties. Where, on the other hand, the parties act in the honest belief that a third party is to join in the agreement, that fact tends to disprove any intent to injure him, whatever may be said of the agreement as to others."

Furthermore, I cannot see why the conspirators should have been excused because they did not learn until after they had entered into the unlawful agreement that the plaintiffs would not join it. The conspiracy was a continuing one reaffirmed de die in diem, and it would seem that the defendants should be held liable if the plaintiffs were directly injured because they continued an unlawful conspiracy after they did know the plaintiffs would not become parties to it.

While there is no evidence of a special hostility to the complainants in particular, as maintaining an open shop, the proofs show a persistent campaign has been made by the combination to compel them to unionize their shop. They suffer in a way different from the commu[480]nity at large. This entitles them to all available civil remedies, among others to injunctive relief. A decree will be entered granting a permanent injunction in accordance with this opinion.

LAWLOR ET AL *v.* LOEWE ET AL.*

(Circuit Court of Appeals, Second Circuit. December 18, 1913.)

[209 Fed. Rep., 721.]

MONOPOLIES (§ 14)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—BOYCOTT—TRADE UNIONS.—Where members of a labor union attempted to compel a hat manufacturer to unionize his factory, left his employment, and prevented others from taking employment therein, and with the assistance of members of affiliated organi-

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* For prior opinions (130 Fed., 633), see volume 2, page 563; (142 Fed., 216) see volume 2, page 854; (148 Fed., 924) see volume 3, [illegible] U. S., 274) see volume 3, page 324; (187 Fed., [illegible] page 264. For later opinion (235 U. S., 522), [illegible]

Syllabus.

zations declared a boycott on his goods in other States into which the goods had been shipped for sale at retail, such acts constituted a combination or conspiracy in restraint of interstate commerce, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 207 (U. S. Comp. St. 1901, p. 3200), for which the manufacturer was entitled to recover treble damages under section 7.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.]

CONSPIRACY (§ 1)—WHAT CONSTITUTES.—A "conspiracy" is a combination between two or more persons to do a criminal or unlawful act, or a lawful act by criminal or unlawful means. There need not be a formal agreement between the conspirators, if it appears they acted in concert and with the design to consummate an unlawful purpose; nor is it necessary that each conspirator shall know of all the means to carry out the purposes of the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 1-5; Dec. Dig. § 1.

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

MONOPOLIES (§ 28)—COMBINATION IN RESTRAINT OF TRADE—NOTICE TO CONSPIRATORS—EVIDENCE.—On an issue as to whether certain members of a trade-union had knowledge of a conspiracy to compel a hat manufacturer to unionize his factory by means of a strike, picketing, and boycott, evidence that copies of a trade journal published by the United Hatters in which articles relating to the affair were printed and which were distributed in various factories without charge so that the workmen could read them if they desired, minutes of the meetings of the local unions of which defendants were members and extracts from another monthly journal containing a notice that all members of labor unions would be held responsible for unlawful acts of such unions, their officers and agents, a copy of which notice was sent to all hatters whose names appeared in the directory in the city where the manufacturer's factory was located, was admissible to show notice.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

MONOPOLIES (§ 28)—RESTRAINT OF INTERSTATE TRADE—NOTICE TO CONSPIRATORS—QUESTION FOR JURY.—In an action against members of a trade-union for conspiracy in attempting to destroy plaintiff's business or compel him to unionize his factory, whether defendants had knowledge of the conspiracy and participated therein *held* for the jury.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

MONOPOLIES (§ 28)—ACTION FOR DAMAGES—INSTRUCTIONS.—In an action against members of a trade-union for conspiracy in aiding an

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Syllabus.

effort to compel plaintiff to unionize his factory, the court charged [722] that mere membership in a labor union and payment of dues did not amount necessarily to counseling, advising, aiding, or abetting in a conspiracy of the officers and members to destroy plaintiff's business, but that if the members paid their dues and continued to delegate authority to their officers and agents to commit unlawful acts which constituted an interference with plaintiff's interstate trade and commerce, under such circumstances as lead you to believe they knew or "ought to have known," and that such officers and agents were in that matter warranted in the belief, that they were acting within their delegated authority, then such members and no others were liable. *Held*, that the words "ought to have known," in the connection in which they were used, were intended to mean only that the jury must be justified in drawing the conclusion that the defendants must have known of the existence of the conspiracy, and so construed did not render the instruction objectionable as misleading.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

WITNESSES (§ 330)—EXAMINATION—CROSS-EXAMINATION.—Where, in an action against members of a trade-union for fraudulent conspiracy in restraint of interstate commerce to regulate plaintiff's business or to compel him to unionize his factory, two of the witnesses testified that they continued to be members of the union after the suit was brought, evidence of their payment of dues after the complaint was served, offered solely as a matter of cross-examination bearing on the truthfulness of their testimony in chief, was competent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106–1108; Dec. Dig. § 330.]

MONOPOLIES (§ 28)—RESTRAINT OF TRADE—ACCRUAL FOR SUIT BROUGHT.—In an action for fraudulent conspiracy in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), evidence showing damages which accrued after suit brought because of acts previously committed was properly admitted.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

MONOPOLIES (§ 28)—INTERSTATE TRADE—RESTRAINT—INSTRUCTIONS—DAMAGES.—In an action for conspiracy in restraint of interstate commerce in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), an instruction that the only acts for which plaintiff may recover are such as are alleged in the complaint and as were done by defendants or their agents before suit brought, and that plaintiffs were entitled to recover all damages which are the proximate and natural result of such acts, including such damages as may have continued or re-

sulted therefrom after suit was commenced, but that no recovery could be had for acts constituting a continuance of the conspiracy after suit brought, was proper.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

In error to the District Court of the United States for the District of Connecticut.

Action by D. E. Loewe and others against Martin Lawlor and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

On writ of error to the District Court for the District of Connecticut to review a judgment entered November 15, 1912, in favor of the plaintiffs and against the defendants for $252,130, being the amount of a trebled verdict, **[723]** interest, costs, and counsel fees. This controversy has been before the courts for nearly a decade. It first appears in the reports in (C. C.) 130 Fed. 633, where a demurrer to a plea in abatement was sustained. A motion to compel the plaintiffs to correct their complaint was denied in (C. C.) 142 Fed. 216. And in (C. C.) 148 Fed. 924, a demurrer to the complaint was sustained upon the ground that the complaint did not allege an interference with interstate commerce. From this decision a writ of error brought the case to this court which, after stating the facts, certified to the Supreme Court the following question:

"Upon this state of facts can plaintiffs maintain an action against defendants under section 7 of the Anti-Trust Act of July 20, 1890?"

Both sides joined in asking that the entire record be sent to the Supreme Court, which was done, and the case came before that tribunal upon the complaint and demurrer. Under section 6 of the Judiciary Act of 1891 (act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], the court was called upon to "decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

In an elaborate opinion by Chief Justice Fuller the court decided that the complaint stated a case within the statute and overruled the demurrer. 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815.

Statement of the Case.

The case then came on for trial upon the merits on October 13, 1909, and, with various adjournments, lasted until February 4, 1910, when the court directed a verdict for the plaintiffs, sending to the jury the question of damages only, which they assessed at $74,000, which was trebled under the law.

The defendant then sued out a writ of error and this court, being of the opinion that the question of the defendants' liability should have been submitted to the jury, reversed the judgment and remanded the case for a new trial. A petition for a rehearing was denied by this court, 187 Fed. 522, 527, 109 C. C. A. 288. The plaintiffs thereafter petitioned the Supreme Court for a writ of certiorari which was denied, 223 U. S. 729, 32 Sup. Ct. 527, 56 L. Ed. 633. The new trial was commenced on August 26, 1912, and on October 11th a verdict was rendered for the full amount demanded. The sections of the Anti-Trust Act which are involved are the first, second, and seventh. They are as follows:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The parties will be alluded to hereafter as plaintiffs and defendants as they appeared in the District Court.

[724] *Alton B. Parker*, of New York City, and *Frank L. Mulholland*, of Toledo, Ohio, for plaintiffs in error.

Daniel Davenport, of Bridgeport, Conn., and *Walter Gordon Merritt*, of New York City, for defendants in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above).

[1] When this cause came on for the second trial all of the fundamental questions of law had been disposed of. That the Anti-Trust Act is applicable to such combinations as are alleged in the complaint is no longer debatable. It makes no distinction between classes, employers and employés, corporations and individuals, rich and poor, are alike included in its terms. The Supreme Court particularly points out that although Congress was frequently importuned to exempt farmers' organizations and labor unions from its provisions, these efforts all failed, and the act still remains, after nearly a quarter of a century of trial, unmarred by amendment, in the language originally adopted. In short, the court held that if the plaintiffs proved the conspiracy or combination as alleged in the complaint, they were within the Anti-Trust Act and entitled to the damages sustained by them.

The plaintiffs proved, either without contradiction or by testimony which the jury was justified in accepting as true, the following propositions:

First. That they were engaged in making hats at Danbury, Connecticut, and had a large interstate business, employing union and non-union labor.

Second. That the individual defendants are members of a trade union known as the United Hatters of North America, which was organized in 1896 and, with a few exceptions unnecessary to consider, paid dues to the local unions at Danbury, Bethel, or Norwalk, Connecticut. These dues, after deducting a certain percentage for the expenses of the local unions, were sent to the treasurer of the United Hatters.

Opinion of the Court.

Third. That the United Hatters were affiliated with the American Federation of Labor, one of the objects of the latter organization being to assist its members in any "justifiable boycott" and with financial help in the event of a strike or lockout.

Fourth. That the United Hatters, through their connection with the Federation of Labor and affiliated associations, exercised a vast influence throughout the country and, by the use of the boycott and secondary boycott, had it in their power to cripple, if not destroy, any manufacturer who refused to discharge a competent servant because he was not a member of the union.

Fifth. That in March, 1901, the United Hatters had resolved to unionize the plaintiffs' factory and informed Mr. Loewe to that effect, their president stating that they hoped to accomplish this in a peaceful manner, but if not, they would resort to their "usual methods."

Sixth. That on the morning of July 25, 1902, the plaintiffs' employés were directed to strike, and the union men left the factory on that day, the non-union men the day after.

[725] Seventh. That this strike temporarily paralyzed the plaintiffs' business and they were not able to reorganize until January, 1903, and then with a force many of whom were unskilled.

Eighth. That almost immediately after the strike a boycott was established and agents of the Hatters were sent out to induce the plaintiffs' customers not to buy any more hats of them. This boycott was successful, and converted a profit of $27,000 made in 1901 into losses ranging from $17,000 in 1902 to $8,000 in 1904, destroying or curtailing a large part of the plaintiffs' business carried on between Danbury, Connecticut, and several other States.

It appears, then, that a combination or conspiracy in restraint of interstate trade was entered into to the great damage of [illegible]intiffs and that all of the defendants who partic[illegible] or aided and abetted the active workers in [illegible] contributed to its support are liable if [illegible]xistence.

[2] The principal question of fact, therefore, is, did the defendants know of the conspiracy, or is the evidence of such a character that the jury were justified in finding that they must have known of its existence? And here it is important to remember that the law does not require the proof of conspiracy by direct and positive proof. This is true even in criminal cases and the reason therefor is plain. Conspirators do not put their agreements in writing; they do not disclose their identity or publish their plans. They work in the dark, they may never be seen together, their acts may have no apparent relation to each other, but if it appears that they are all working to accomplish an unlawful purpose which is for their common benefit and in the gains of which all are to share, a jury is justified in finding the existence of a conspiracy. A conspiracy has been well defined as:

"A combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means." 8 Cyc. 620.

It is not necessary that there be a formal agreement between the conspirators. If the evidence satisfies the jury that they acted in concert, understandingly, and with the design to consummate an unlawful purpose, it is sufficient. It is not necessary that each conspirator shall know of all of the means employed to carry out the purposes of the conspiracy. If, then, the evidence is sufficient to warrant the jury in finding that the defendants knew of the unlawful purpose, by means of boycotts and strikes, to destroy the interstate business of the plaintiffs and thereafter continued to aid and abet such purpose, it is sufficient. *Pettibone* v. *U. S.*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; *U. S.* v. *Cassidy* (*D. C.*), 67 Fed. 698.

As to the defendants who were in the employ of the plaintiffs at the time of the strike and participated therein, we understand that it is not pretended that they were ignorant of the general purpose of the United Hatters. As to the remainder, estimated by the defendants' counsel to be bout ninety per cent, it is contended that they knew noth- ıg of the purpose of the strike except that it was "to

establish union conditions in that particular (Loewe's) factory."

The plaintiffs insist that the measures adopted by the United Hatters for establishing "union conditions" were well known to every [726] member of the organization, as they had been frequently enforced before. The plaintiffs assert that every member of the union knew that these measures consisted in calling a strike and if that failed then in declaring a boycott and withdrawing patronage from all who dealt in the prohibited goods. To accomplish these ends it had been customary in the past to send so-called "missionaries" to the customers of the manufacturer throughout the country to induce them to refuse to handle his goods under threat of the destruction of their own business if they refused.

[3, 4] The defendants reside at Bethel, Norwalk, or Danbury, all in the same general locality and so near that it is highly improbable that an event of vital importance to one union would not be known to the other two. But in order to show that the dispute between Loewe and the union excited general interest in the community, newspaper articles published in these towns were introduced in evidence, not as proof of the circumstances therein narrated but to show the improbability of the defendants being ignorant of matters which were constantly being made public and were of vital significance to them, relating as they did, to a controversy which might impair or destroy their own means of livelihood. As to one hundred and fifteen of the defendants it was stipulated that if called as witnesses they would testify "that they read with more or less regularity some local newspapers in their respective towns, but not completely or invariably." As to the Journal of the United Hatters, it was stipulated that the secretaries of the local unions in question received copies which were distributed in the various factories without charge, so that the workmen there could read them if they desired to do so. The plaintiffs introduced the minutes of the meetings of the local -hich the defendants were members; also extracts ist, a monthly journal of the Federa-

tion of Labor, and a notice warning all members of labor unions that they would be held responsible for unlawful acts of such unions, their officers, and agents. A copy of this notice was sent to all hatters whose names appeared in the Danbury Directory. It cannot be denied that all this evidence was competent as to those who actually received it or had knowledge of it and we think it was for the jury to say whether it was sufficient to put the alleged conspirators upon notice of the illegal measures by which it was proposed to enforce the demands of the defendants.

We do not deem it necessary to deal with each of these pieces of evidence separately, principally because, in our judgment, such an analysis would be a wholly inadequate and indeterminate procedure. It may be that many of the items considered alone failed to give the adequate information, but considered in its entirety have not the plaintiffs shown a situation where the jury were justified in finding that the members of the unions knew what was being done? A bitter and acrimonious dispute was being waged between employers and employés in a comparatively small community. It was a dispute which involved loss of employment on the one side and the loss of a flourishing business on the other. The progress of the controversy was described in the local press and in the papers published by the unions. Was it not [727] clearly a question of fact for the jury to say whether the defendants, thus vitally interested, could have remained ignorant of the measures adopted by their own societies in their behalf? We are clearly of the opinion that it was.

The learned counsel for the defendants argue, and cite numerous cases to sustain the contention, that labor unions are lawful. No one disputes this proposition. All must admit, not only that they are lawful but highly beneficial when legally and fairly conducted, but, like all other combinations, irrespective of their objects and purposes, they must obey the law.

Any discussion of these questions is rendered unnecessary by the decision of the Supreme Court overruling the demurrer. That the complaint states a cause of action is

no longer debatable. The question is, does the testimony sustain the allegations? Without attempting to review the testimony in detail, it suffices to say that the jury were fully justified in finding that the measures adopted by the defendants prevented the free flow of commerce between the States. The great bulk of the plaintiffs' business was in States other than Connecticut, to which States the product of their factory was shipped and the proof shows that they suffered great pecuniary loss, equal at least to the amount found by the jury, because of their inability to sell to their interstate customers.

[5] The court charged the jury as follows:

"Now if this evidence falls short of satisfying you that certain of these defendants did know of this unlawful conspiracy, or were in duty bound to know of it, or did tacitly approve of it, then such defendants should be acquitted, if any there may be; or, in other words, assuming that there was a conspiracy to violate the Federal statute, as I have explained to you, and that the statute was, in fact, violated, to the damage of the plaintiffs, then every person who had a part in planning or a hand in executing, or aided, or abetted therein, is jointly liable. Membership in a labor union and the payment of dues, are not acts of themselves that necessarily constitute counseling, advising, aiding, or abetting. Membership and payment of dues are the life of the voluntary association, and are the foundation of all its authority and the source of financial assistance in executing that authority.

"If these members paid their dues and continued to delegate authority to their officers and agents to commit unlawful deeds, which, in this case, is the interference with the plaintiffs' interstate trade and commerce, under such circumstances as lead you to believe that they knew, or ought to have known, and that such officers and agents were, in that matter, warranted in the belief that they were acting within their delegated authority, then such members are jointly liable, and no others."

The defendants excepted to this charge, and have presented the question by proper assignments of error. The principal criticism of the charge is directed to the use of the words "or ought to have known" in the last paragraph quoted above. If these words had been used alone, with no qualification or explanation, there might be some room for criticism, but when considered in connection with the [illegible] charge, we are entirely satisfied that the jury

could not have been misled. As previously pointed out, in cases of conspiracy it is sufficient if a state of facts be shown from which the jury are justified in drawing the conclusion that the defendants must have known of the existence of the conspiracy. It was in this sense that the judge used the [728] words "ought to have known." He left to the jury the question which the judge on the preceding trial regarded as established by such overwhelming proof that he decided it as a matter of law, viz: Did the defendants know of the combination to destroy the plaintiffs' business?

In cases where actual knowledge is not shown, the question is, was the proof of such a character that the jury was justified in finding that a member of the local unions in good standing, attending their meetings, paying his dues, having access to their publications, knowing their methods and having struck with his fellow members because of the plaintiffs' refusal to be dictated to by the union as to the manner in which their business should be conducted, must have known what was being done? A soldier who with his regiment charges the enemy's line can hardly be heard to assert that he did not know a battle was in progress.

In *Martin* v. *Webb*, 110 U. S. 7, at page 15, 3 Sup. Ct. 428, at page 433 (28 L. Ed. 49), Mr. Justice Harlan says:

> "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

[6] It is true that in our former opinion we said that testimony of the payment of dues by the defendants after the complaint was served was inadmissible, but we do not think that this ruling applies to the testimony of Hoy and Bressen, for the reason that the answers of these witnesses that they continued members after the suit was commenced, elicited on cross-examination, were admitted "solely as a

matter of cross-examination bearing upon the truthfulness of the testimony in chief." That it was proper for this purpose we have no doubt. In order to understand the attitude of the witnesses to the controversy and to the parties, it was competent to show what their relations were to the parties. The plaintiffs on cross-examination had the same right to show that the witness was a member of the local union in good standing, as the defendants would have to show that a witness called by the plaintiffs was a partner in their firm. In either case the testimony shows the jury what manner of man the witness is and what interest he has in the result.

[7] We see no error in the admission of testimony showing damages accruing after the commencement of the action. It must be admitted that it is for the interest of all parties that this controversy be disposed of finally in a single action. If a plurality of actions are brought the defendants will have good ground for the complaint that they are subjected to unnecessary expense and annoyance by being compelled to defend a second action, the trial of which will consume several months. The charge of persecution in such circumstances would not be without justification.

[729] [8] The judge charged the jury on this subject as follows:

> "The only acts of the defendants for which the plaintiffs may recover damages in this case are such acts as are set forth in the complaint and as were done by the defendants or their agents before the suit was commenced, and the plaintiffs are entitled to recover all damages which are the proximate and natural result of such acts, including such damages as may have continued or resulted therefrom after the suit was commenced by the plaintiffs, but cannot recover in this suit for any damages which are the result of the continuation of the alleged conspiracy after the suit was commenced or which are the result of the performance of any acts in furtherance of said conspiracy after the suit was commenced."

We think this instruction states the rule correctly; it is based upon authority and common sense. The trial proceeded throughout upon the theory that the only acts of the [illegible]ts for which a recovery could be had must have [illegible] before [illegible]it and must have been acts alleged

in the complaint. Damages resulting or continuing from such previous acts might be recovered in the present suit, but no damages resulting from acts committed in furtherance of the conspiracy after the commencement of the suit could be so recovered. In other words, if the damages due to acts done previous to the suit continued thereafter, the plaintiffs could recover, but they could not recover for acts subsequent to the suit or for damages resulting from a continuance of the conspiracy after the commencement of the suit. Assuming that the suit was commenced September 30, 1903, the plaintiffs were permitted to recover damages for acts done prior to September 30, although the damages resulting therefrom continued after that date. The plaintiffs were not permitted to recover damages resulting from the continuation of the conspiracy after September 30, and they were not permitted to recover damages resulting from an act done after September 30, 1903.

We see no error in the charge or in the rulings of the judge upon these questions, which rulings are sustained by the following authorities: *New York, etc., R. Co.* v. *Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; *Occidental Con. Mining Co.* v. *Comstock Co.* (C. C.) 125 Fed. 244; *Cooper* v. *Sillers*, 30 App. D. C. 567.

Other exceptions were taken which are argued in the defendants' brief, but we do not deem it necessary to discuss them further than we have already done, in view of the decision of the Supreme Court and our own previous decision.

No one can examine this voluminous record without being impressed with the fact that the trial was conducted with perfect impartiality and with a determination on the part of the judge that both parties should have an absolutely fair trial. We are convinced that the defendants have had such a trial and that no error was committed which would justify us in imposing upon the parties the expense and delay of a third trial.

The judgment is affirmed with costs.

Syllabus.

LAWLOR *v.* LOEWE.[a]

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 358. Argued December 10, 11, 1914.—Decided January 5, 1915.

[235 U. S., 522.]

Irrespective of compulsion or even agreement to observe its intimation, the circulation of a "we don't patronize" or "unfair" list manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers, combined with a view to joint action and in anticipation of such reports, is within the prohibition of the Anti-Trust Act of July 2, 1890, if it is intended to restrain and does restrain commerce among the States. *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600.[b]

This court agrees with the courts below that the action of the unions and associations to which defendants belonged in regard to the use and circulation of "we don't patronize" and "unfair dealer" list, boycotts, union labels, and strikes, amounted to a combination and conspiracy forbidden by the Anti-Trust Act of July 2, 1890.

In this case *Held*, That the trial court properly instructed the jury to the effect that defendants, members of labor unions who paid their dues and continued to delegate authority to their officers to unlawfully interfere with the interstate commerce of other parties, are jointly liable with such officers for the damages sustained by their acts.

Members of unions and associations are bound to know the constitutions of their societies; and, on the evidence in this case, the jury might well find that the defendants who were members of labor **[523]** unions knew how the words of the constitutions of such unions had been construed in the act.

The use in this case of the word "proof" by the trial judge in its popular way for "evidence," *held*, in view of the caution by the judge, not to have prejudiced the defendants.

A verdict for damages resulting from an illegal combination in restraint of interstate trade under the Anti-Trust Act of 1890, may include those accruing after commencement of the suit but as the consequence of acts done before and constituting part of the cause of action declared on.

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[a] For prior [illegible] (130 Fed., 633) see volume 2, page 563; (142 Fed., 216) [illegible] 854; (148 Fed., 924) see volume 3, page 41; (208 [illegible] ume 3, page 324; (187 Fed., 522) see volume [illegible] 721) see *ante*, page [illegible]

[b] [illegible] of arguments [illegible] 915, by The [illegible] pany.

In this case, introduction of newspapers was not improper to show publicity in places and directions to bring notice home to defendants and to prove intended and detrimental consequences of the acts complained of.

Letters from customers of a boycotted manufacturer, giving the boycott as reason for ceasing to deal with him, *held* admissible in this case.

209 Fed. Rep. 721, affirmed.

The facts in this case, which is known as the Danbury Hatters' case, involving the validity of a verdict for damages resulting from a combination and conspiracy in restraint of trade under § 7 of the Anti-Trust Act, are stated in the opinion.

Mr. Alton B. Parker, with whom *Mr. Frank L. Mulholland* was on the brief, for plaintiffs in error.

The trial court erred in refusing to instruct the jury as to the coercive character of the combination alleged in the complaint, as to the legality of the Hatters' Union label, and as to the character of the boycott alleged.

The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes (*Loewe* v. *Lawlor*, 208 U. S. 274) and the requests for instructions to this effect should have been granted.

It was not unlawful to attempt to unionize, that is, establish union conditions in the plaintiffs' factory, by [524] means of a strike. It is the absolute right of every workman to exercise his own option in regard to the persons with whom he will agree to work or with whom he will continue to work, and, therefore, union workmen may refuse to continue to work with those who are not members of their union. *Adair* v. *United States*, 208 U. S. 161, and cases cited in margin of page 175; *Allis-Chalmers Co.* v. *Iron Moulders' Union*, 150 Fed. Rep. 155, 172; *National Protective Ass'n* v. *Cumming*, 170 N. Y. 315; *Allen* v. *Flood* (1898), App. Cas. 1.

A [illegible]ike does not become unlawful because it is the [illegible] orders by the officers of a labor union to which

the strikers belong. *Thomas* v. *Cincinnati &c. R. R.*, 62 Fed. 803, 817; *Wabash Ry.* v. *Hannahan*, 121 Fed. 563, 571; *Delaware &c. R. R.* v. *Switchmen's Union*, 158 Fed. Rep. 541, 544; *Aluminum Castings Co.* v. *Local No. 84*, 197 Fed. Rep. 221, 223; *Saulsberry* v. *Coopers' Union*, 147 Kentucky, 170, 174; *Jose* v. *Metallic Roofing Co.* (1908), App. Cas. 514, 518.

The union label of the United Hatters is, in the States where it is registered according to law, a statutory trade-mark, and the officers and agents of the United Hatters have the same right to solicit trade for hats bearing their label as any merchant has to solicit trade for goods bearing his trade-mark; and the plaintiffs cannot recover in this action for damages resulting from the loss or diminution of business due solely to an unusual demand for union-label hats. Laws for the registration and protection of trade-union labels are in force in at least forty-one States and Territories (Spedden on the Trade Union Label, p. 97), and the constitutionality of these statutes has uniformly been upheld. 7 Labbatt's Master and Servant, p. 8656, § 2786; *Perkins* v. *Heert*, 158 N. Y. 306. A voluntary withholding of patronage by members of labor unions and by those who sympathize with organized labor from all goods except those which bear the union [525] label is not unlawful and is not a boycott, in the legal sense of the term.

Members of a combination having a common interest to subserve may inform one another of the names of those whom they deem inimical; this does not constitute a threat or intimidation and does not amount to coercion. 7 Labbatt's Master and Servant, p. 8453; *Montgomery Ward & Co.* v. *South Dakota Ass'n*, 150 Fed. Rep. 413; Van Orsdel, J., in *American Federation* v. *Buck's Stove Co.*, 33 App. D. C. 83, 123; *Gray* v. *Building Trades Council*, 91 Minnesota, 171.

In the legal sense of the term, the word threat does not embrace every announcement of an intention to do an act
will result in an injury to another; it embraces only
intention to do an unlawful act.
rvant, pp. 8448, 8458; *National*

Protective Ass'n v. *Cumming*, 170 N. Y. 315, 329; *Cote* v. *Murphy*, 159 Pa. St. 420, 431; *Macauley Bros.* v. *Tierney*, 19 R. I. 255; *Payne* v. *Western &c. R. Co.*, 81 Tennessee (13 Lea), 507, 521; dissenting opinion by Caldwell, J., in *Hopkins* v. *Oxley Stave Co.*, 83 Fed. Rep. 912, 924.

And coercion, in the legal sense of the term, does not embrace every constraint placed upon the free will of another, but only such constraint as results from the announcement of an intention to do, or from the doing of, an unlawful act to the prejudice of the person constrained. 7 Labbatt's Master and Servant, p.p. 8448, 8458; *Parkinson Co.* v. *Building Trades Council*, 154 California, 581.

Since the defendants in this case, although members of local unions of hatters which were affiliated with the national organization known as the United Hatters of North America, did not participate in the acts of the officers and agents of the national association which are relied upon to establish the allegation of the complaint, [526] they can be held liable only on the ground that they had knowledge of, and, having knowledge, acquiesced in, those acts; membership in a local union and the payment of dues are not alone sufficient to make the defendants liable for the unlawful acts of the officers and agents of the national association. *Benton* v. *Minneapolis Tailoring Co.*, 73 Minnesota, 498; *United States* v. *Cohen*, 128 Fed. Rep. 615, affirmed, 145 Fed. Rep. 1, writ of error denied, 200 U. S. 618; *Lawlor* v. *Loewe*, 187 Fed. Rep. 522.

It was error for the trial court to permit the defendants who testified to be cross-examined as to whether they continued to pay dues after the service of the complaint, whether they investigated the truth of the matters therein alleged and whether they made any attempt to prevent the election of the same officers as before. *Lawlor* v. *Loewe*, 187 Fed. Rep. 522, 527.

It was error to admit in evidence articles and items from newspapers published in the vicinity in which the defendants resided for the purpose of proving knowledge of their contents by the defendants who were not shown to have read the newspapers. *Leeson* v. *Holt*, 1 Stark. 186; *Graham* v. *Hope*, Peake's N. P. Cas. 154; *Roberts* v. *Spencer*, 123

Massachusetts, 397; *Clark* v. *Ricker*, 14 N. H. 44, 48; *Milbank* v. *Dennistoun*, 10 Bosw. (N. Y.) 382, 393. Hence it was also error to admit in evidence items from the Journal of the United Hatters and from the American Federationist.

To make a newspaper publication admissible in evidence to show knowledge of their contents, the facts therein stated must be established by independent evidence.

Newspaper publications are not admissible to prove the truth of the statements therein contained. 13 Halsbury's Laws of England, p. 565, citing *Bossinore (Lord)* v. *Mowatt* (1850), 5 Jur. 238; 9 Am. & Eng. Enc. L., 2d ed., **[527]** p. 885; *Child* v. *Sun Mut. Ins. Co.*, 3 Sandf. (N. Y.) 26, 43; *Fosgate* v. *Herkimer Mfg. Co.*, 9 Barb. (N. Y.) 287; *Downs* v. *N. Y. Cent. R. R.*, 47 N. Y. 83; *Riley* v. *St. John*, 11 New Bruns. 78.

The testimony of witness for the plaintiffs as to the reason given by retail dealers in hats, who bought hats from jobbers or wholesale dealers purchasing their goods from the plaintiffs, for withdrawing their patronage from these jobbers or wholesale dealers, was not admissible. *Tilk* v. *Parsons*, 2 C. & P. 202; *Lawlor* v. *Loewe*, 187 Fed. Rep. 522, 527.

Depositions containing no material nor relevant testimony but which merely disclosed the fact that the witnesses refused to answer questions on the ground that their testimony might incriminate them were inadmissible and their admission in evidence constitutes prejudicial error. *Philin* v. *Kenderline*, 20 Pa. St. 354; *Carne* v. *Litchfield*, 2 Michigan, 340; *Garrett* v. *St. Louis Transit Co.*, 219 Missouri, 65, 69.

The trial court erred in admitting evidence of, and allowing recovery for, damages accruing after the commencement of the action. The wrongful combination or conspiracy alleged in the case at bar is a continuing wrong of a temporary, removable character for which successive actions may be maintained from time to time as damages accrue. Obviously it is not distinguishable in this respect from trespasses and nuisances which are not of a permanent nature. The plaintiffs should therefore have been limited in their recovery to the damages which had a

when the action was commenced. *Denver City Water Co.* v. *Middaugh*, 12 Colorado, 432; *Savannah &c. Co.* v. *Bourquin*, 51 Georgia, 378; *Bailey* v. *Heintz*, 71 Ill. App. 189; *Catlin Coal Co.* v. *Lloyd*, 109 Ill. App. 122; *Gebhardt* v. *St. Louis &c. R. R.*, 122 Mo. App. 503; *Troy* v. *Chesshire R. R.*, 23 N. H. (3 Fost.) 83, 101; *Brewster* v. *Sussex R. R.*, 40 N. J. L. (11 Vroom), [528] 57; *Church* v. *Paterson &c. R. R.* 66 N. J. L. (37 Vroom), 218, 231; 68 N. J. L. (39 Vroom), 390; *Blunt* v. *McCormick*, 3 Denio (N. Y.), 283; *Uline* v. *N. Y. Cent. R. R.*, 101 N. Y. 98, 109–116; *Park* v. *Hubbard*, 134 App. Div. 468; 198 N. Y. 136; *Duncan* v. *Markley*, 1 Harper (S. Car.), 276; *Iron Mountain Ry.* v. *Bingham*, 87 Tennessee, 522, 536; *Cobb* v. *Smith*, 38 Wisconsin, 21, 36; *Hadler* v. *Griebew*, 61 Wisconsin, 500.

Mr. Walter Gordon Merritt and *Mr. Daniel Davenport* for defendants in error.

The court properly and adequately charged the jury as to what constituted an unlawful restraint of interstate trade under the Sherman Anti-Trust Act as applied to the allegations and issues in this case. The testimony clearly establishes a conspiracy in restraint of trade among the States, and any act, though otherwise innocent, done in carrying out that illegal conspiracy was unlawful and for the damage to their business caused thereby the plaintiffs are entitled to recover. *Loewe* v. *Lawlor*, 208 U. S. 274; *Aikens* v. *Wisconsin*, 195 U. S. 194. The attempted distinction between the primary and secondary boycotts is also not pertinent, because the prohibitions of the Sherman Anti-Trust Act extend to both alike. The act recognizes no such distinction. *Eastern States Lumber Dealers* v. *United States*, 234 U. S. 600. For the same reason the use of "unfair" and "we don't patronize" lists by the defendants was unlawful under the Sherman Act. As defendants used the union label as an instrument to carry out their conspiracy to restrain the plaintiffs' interstate trade, the plaintiffs can recover for the damages which resulted from such illegal And since the strike of the plaintiffs' workmen, or-

dered by the officers of the United Hatters, was a step in carrying out the conspiracy, it was unlawful and the damages which directly and proximately resulted to the plaintiffs' business there[529]from are recoverable in this action, even though the defendants did not intend to resort to interstate boycotting, unless the same became necessary to accomplish their object of unionizing the plaintiffs' factory. *Davis* v. *United States*, 107 Fed. Rep. 754.

The charge of the court to the effect that the individual defendants, members of the union, were liable under the Sherman Anti-Trust Act if they knew, or ought to have known, or were in duty bound to know, that their union and its officers were engaged in the conspiracy to restrain the plaintiffs' interstate trade, was under the circumstances of the case correct. *Rogers* v. *Vicksburg Ry.*, 194 Fed. Rep. 65; *Martin* v. *Webb*, 110 U. S. 7; *Jones* v. *Maher*, 116 N. Y. Supp. 180. Where an agent is enabled to commit unlawful acts through the negligence of his principal, the latter may even be held criminally liable. Clark & Sykes on Agency, p. 1141; *Commonwealth* v. *Morgan*, 107 Massachusetts, 199. The officers of the union, in carrying out the conspiracy, were acting within the scope of their employment and in furtherance of the organization's purposes, and the defendants' conduct warranted them in assuming that they were acting with the defendants' authority and approval. Defendants are liable under the rule of *respondeat superior*. Dicey on Parties, p. 170; Meacham on Agency, par. 72; Clark & Sykes on Agency, p. 61; *Willcox* v. *Arnold*, 162 Massachusetts, 577; *McDermott* v. *Wilhelmina*, 24 R. I. 535; *Supreme Lodge* v. *Knight*, 117 Indiana, 489. The individual members of these associations are liable as principals for what their officers did in the performance of their constitutional duty to unionize all the shops in the trade, even though they did not know of the particular acts done or may have disapproved of or have forbidden them. *New York Central* v. *United States*, 212 U. S. 481; *Phila. & Reading R. R.* v. *Derby*, 14 How. 468; *Lake Shore Ry.* v. *Prentice*, 147 U. S. 103; Holmes on Agency, 4 Harv. [530] Law Rev. 348; Wigmore, 7 Harv. Law Rev. 315,

384, 440. The Sherman Act is a highly remedial statute and on its face indicates an intent to apply those principles to all associations which may violate it. Since the union was authorized to engage in strikes, neither it nor its members can escape responsibility for illegal strikes conducted in furtherance of its purposes. *Taff Vale Ry.* v. *Amalgamated Society* (1901), A. C., 426; *Giblan* v. *National Laborers' Union*, 2 K. B. 600 (1903); *Kinver* v. *Phœnix Lodge*, 7 Ont. Rep. 387; Permant on Trade Unions, p. 81; *Lucke* v. *Clothing Cutters*, 19 L. R. A. 408. If the union could be held liable, the members thereof, being unprotected by incorporation, are liable. *Vredenburg* v. *Behan*, 33 La. Ann. Rep. 627; *Patch Mfg. Co.* v. *Protection Lodge*, 77 Vermont, 294; *Patch Mfg. Co.* v. *Capeless*, 63 Atl. Rep. 939; *Ill. Cent. Ry.* v. *International Ass'n*, 190 Fed. Rep. 910; *Aluminum Castings Co.* v. *Local No. 84*, 197 Fed. Rep. 221; *Lawler* v. *Murphy*, 58 Connecticut, 294; 8 L. R. A. 112; *In re Peck*, 206 N. Y. 55; *Cheney* v. *Goodwin*, 88 Maine, 567; *Bennett* v. *Lathrop*, 71 Connecticut, 613; *Hodgson* v. *Baldwin*, 65 Illinois, 532; *Jenne* v. *Matlack*, 41 S. W. Rep. 11; *Crawley* v. *American Society*, 139 N. W. Rep. 734; *McKenney* v. *Bowie*, 94 Maine, 397; *Willcox* v. *Arnold*, 162 Massachusetts, 577; *Tyrell* v. *Washburn*, 88 Massachusetts, 466; Bacon on Societies (1904), § 120; Niblack on Voluntary Societies (1888), §§ 98–100.

The rule of *respondeat superior* applies to conspiracies the same as to any other torts. *Schultz* v. *Frankfort Co.*, 139 N. W. Rep. 387. An agent has often no financial resources, and in order to approximate justice it is necessary that the injured party should be allowed to resort to the principal in order to find a full purse. Under the statutes of Edward I, the injured party was required to exhaust his remedy against the agent and could only look to the principal for satisfaction of the deficiency. **[531]** This shows that the basis of imputed liability is the necessity of finding a responsible party, for the protection of society. 2 Pollock & Maitland, p. 533. The conditions surrounding the organization of a modern labor union call eloquently for the application of this line of reasoning. If an individual

corporation can be held liable for the acts of ten thousand agents, there can be no reason why one hundred thousand members of a single labor union should not divide responsibility for the acts of ten agents. If they are actually innocent of wrongdoing, they can compel their fellow members to pro rate the liability. *Wooley* v. *Batte*, 2 C. & P. 417; *Horbach* v. *Elder*, 18 Pa. St. 33; *Vandiver* v. *Pollak*, 19 L. R. A. 628 (9 Cyc. 805).

The plaintiffs are entitled to recover all damages which are the proximate result of acts committed before the suit was commenced, even though such damages continued or resulted therefrom after suit was commenced. Proof of damage due to the acts complained of may extend to the date of the verdict. *Wilcox* v. *Plummer*, 4 Peters, 172; *New York* v. *Estill*, 147 U. S. 591; *Occidental Mining Co.* v. *Comstock Tunnel Co.*, 125 Fed. Rep. 244; *Joseph Schlitz Brewing Co.* v. *Comton*, 18 L. R. A. 390; *Ridley* v. *Seaboard R. R.*, 32 L. R. A. 708; *Jones* v. *Allen*, 85 Fed. Rep. 527; 1 Sutherland on Damages, § 113; *C. & N. W. Ry.* v. *Hoag*, 90 Illinois, 347; *Hicks* v. *Herring*, 17 California, 569; *Weston* v. *Barnicoat*, 175 Massachusetts, 456; *Cooper* v. *Stillers*, 30 App. D. C. 567; 23 Cyc. 446; *Troy* v. *Cheshire Railroad Co.*, 23 N. H. 101; *Powers* v. *Council Bluffs*, 45 Iowa, 652; *National Copper Co.* v. *Minnesota Mining Co.* 57 Michigan, 83; *Lord* v. *Carbon Mfg. Co.*, 6 Atl. Rep. 812; 1 Joyce on Damages, par. 250; 1 Sedgwick on Damages, 9th ed., § 869.

The court properly left the jury to determine what portion of the continuing damages was due to acts prior to the date of suit for which recovery could be had, and [532] what portion was due to acts subsequent to date of suit for which recovery could not be had in this suit. *Jenkins* v. *Penn. R. R.*, 57 L. R. A. 309; *C. & N. W. Ry.* v. *Hoag* (*supra*); *Post* v. *Hartford St. Ry.*, 72 Connecticut, 362.

It was proper to cross-examine the defendants as to whether, after the suit was commenced, they continued paying dues and reelected the same officers who committed unlawful acts, since such evidence bore upon the intent knowledge of the defendants relative to similar trans- it could properly have been admitted on direct

examination. *Exchange Bank* v. *Moss*, 149 Fed. Rep. 340; *Wood* v. *United States*, 16 Peters, 342; Wigmore on Evidence, §§ 316, 320, 325, 333, 363, 364, 370; *Moore* v. *United States*, 150 U. S. 60.

The subsequent conduct of the defendants toward their agents tended to prove the previous authority of those agents. *Fisher* v. *Campbell*, 9 Porter, 215 (Ala.); *Columbia Land Co.* v. *Tinsley*, 60 S. W. Rep. 10; *Cheshire Institution* v. *Vandergrift*, 95 N. W. Rep. 615; *Rice* v. *Ege*, 42 Fed. Rep. 663; *Elwell* v. *Russell*, 71 Connecticut, 465; 1 Greenleaf on Evidence, § 53.

It was proper for salesmen to testify as to the reasons given them by customers for refusing to purchase plaintiffs' hats. *Elmer* v. *Fessenden*, 151 Massachusetts, 361; *Hine* v. *N. Y. El. R. R.*, 149 N. Y. 154; *Casey* v. *Typographical Union*, 45 Fed. Rep. 135; *Maryland Lodge* v. *Adt*, 100 Maryland 238; Wigmore on Evidence, § 1729, subd. 2; *Hadley* v. *Carter*, 8 N. H. 42; *Steketee* v. *Kimm*, 48 Michigan, 322; *Webb* v. *Drake*, 52 La. Ann. 290; *Weston* v. *Barnicoat*, 175 Massachusetts, 456 *Bausbach* v. *Reiff*, 91 Atl. Rep. 224 (Pa.).

Extracts from the Journal of the United Hatters and extracts from the daily newspapers of Danbury and Norwalk relative to the boycotting operations of the United Hatters were properly admitted in evidence to show that **[533]** the defendants had knowledge of the illegal acts which were being carried on by their organization. *Adams* v. *State*, 25 Oh. St. 584; *American Fire Ins. Co.* v. *Landfare*, 56 Nebraska 482; 2 Taylor on Evidence, §§ 1656 and 1665–6; *Leeson* v. *Holt*, 1 Stark. 186 (1816); Wigmore on Evidence, §§ 251–255.

Extracts from the daily papers referring to the boycott were admissible in evidence as showing the general publicity intentionally given to the boycott for the purpose of intimidating the plaintiffs' customers.

Mr. Justice Holmes delivered the opinion of the court.

This is an action under the act of July 2, 1890, c. 647, § 7, 26 Stat. 209, 210, for a combination and conspiracy in restraint of commerce among the States, specifically directed

against the plaintiffs (defendants in error), among others, and effectively carried out with the infliction of great damage. The declaration was held good on demurrer in *Loewe* v. *Lawlor*, 208 U. S. 274, where it will be found set forth at length. The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other States and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other States. The case now has been tried, [534] the plaintiffs have got a verdict, and the judgment of the District Court has been affirmed by the Circuit Court of Appeals. 209 Fed. Rep. 721; 126 C. C. A. 445.

The grounds for discussion under the statute that were not cut away by the decision upon the demurrer have been narrowed still further since the trial by the case of *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600. Whatever may be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States.

requires more than the blindness of justice not to see
s of the United Hatters and the Federa-
which the defendants belonged, in
g from headquarters made use

of such lists, and of the primary and secondary boycott in their effort to subdue the plaintiffs to their demands. The union label was used and a strike of the plaintiffs' employés was ordered and carried out to the same end, and the purpose to break up the plaintiffs' commerce affected the quality of the acts. *Loewe* v. *Lawlor*, 208 U. S. 274, 299. We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statutes were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the **[535]** plaintiff's interstate commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. It is a tax on credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the "We don't patronize" or "Unfair" list were means expected to be employed in the effort to unionize shops. Very possibly they were thought to be lawful. See *Gompers* v. *United States*, 233 U. S. 604. By the constitution of the United Hatters the directors are to use "all the means in their power" to bring shops "not under our jurisdiction" "into the trade." The by-laws provide a separate fund to be kept for strikes, lockouts, and agitation for the union label. Members are forbidden to sell non-union hats. The Federation of Labor with which the Hatters were affiliated had organization of labor for one of its objects, helped affiliated unions in trade disputes, and to that end, before the present trouble, had provided in its constitution for prosecuting and had prosecuted many what it called

legal boycotts. Their conduct in this and former cases was made public especially among the members in every possible way. If the words of the documents on their face and without explanation did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the States. We think it unnecessary to repeat the evidence of the publicity of this par[**536**]ticular struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiffs, did not know what was done in the specific case. If they did not know that, they were bound to know the constitution of their societies, and at least well might be found to have known how the words of those constitutions had been constructed in the act.

It is suggested that injustice was done by the judge speaking of "proof" that in carrying out the object of the associations unlawful means had been used with their approval. The judge cautioned the jury with special care not to take their view of what had been proved from him, going even further than he need have gone. *Graham* v. *United States*, 231 U. S. 474, 480. But the context showed plainly that proof was used here in a popular way for evidence and must have been understood in that sense.

Damages accruing since the action began were allowed, but only such as were the consequence of acts done before and constituting part of the cause of action declared on. This was correct. *New York, Lake Erie & Western R. R.* v. *Estill*, 147 U. S. 591, 615, 616. We shall not discuss the objections to evidence separately and in detail as we find no error requiring it. The introduction of newspapers, etc., was proper in large part to show publicity in places and directions where the facts were likely to be brought home to the defendants, and also to prove an intended and detrimental consequence of the principal acts, not to speak of other grounds. The reason given by customers for ceasing to deal with sellers of the Loewe hats, including letters from

dealers to Loewe & Co., were admissible. 3 Wigmore, Evidence § 1729 (2). We need not repeat or add to what was said by the Circuit Court of Appeals with regard to evidence of the payment of dues after this suit was begun. And in short neither the ar[537]gument nor the perusal of the voluminous brief for the plaintiffs in error shows that they suffered any injustice or that there was any error requiring the judgment to be reversed.

Judgment affirmed.

FLEITMANN v. UNITED GAS IMPROVEMENT CO. ET AL. (two cases).[a]

(Circuit Court of Appeals, Second Circuit. January 13, 1914.)

[211 Fed. Rep., 103.]

MONOPOLIES (§ 28)—ACTIONS FOR DAMAGES—FORM OF REMEDY.—Under the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202) § 7, providing that any person injured by any violation of that act may sue therefor and recover threefold the damages by him sustained, the action to recover treble damages must be an action at law in which defendants have the constitutional right to a jury trial, and hence a minority stockholder in a corporation could not maintain a suit in equity on behalf of the corporation for such relief upon the corporation's refusal to sue.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.

Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to Chicago Wall Paper Mills v. General Paper Co., 78 C. C. A. 612.]

MONOPOLIES (§ 28)—ACTIONS FOR DAMAGES—FORM OF REMEDY.—Where the sole relief prayed in a bill by a minority stockholder of a corporation was that the defendants be decreed to pay over to the corporation treble the damages sustained by a violation of the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), it could not be construed as a bill to require the corporation, which was made a party, to sue the other defendants for such damages.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

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[a] For opinion in the Supreme Court (240 U. S., 27), see *post*, page 429.

Statement of the Case.

Appeals from the District Court of the United States for the Southern District of New York.

Suit by William M. Fleitmann on behalf of himself and all other stockholders of the Consolidated Street Lighting Company who shall elect to come in and contribute to the expense of the action against the United Gas Improvement Company and others. From decrees dismissing the bills on motions of the defendants, Welsbach Street Lighting Company of America, and Arthur E. Shaw, respectively, complainant appeals. Affirmed.

Complainant brought suits in equity on his behalf and on behalf of all other stockholders of the Consolidated Street Lighting Company, not to recover personal damages or a personal judgment, but to compel defendant to pay to the Consolidated Company the amount for which defendant would be liable at law in a direct action by that corporation, because of violations of the Sherman Anti-Trust Act, whereby the Consolidated Company, of which complainant is a minority stockholder, has, it is alleged, been driven out of business.

The opinion of Judge Coxe in District Court, mentioned in the opinion, was as follows:

The defendants, the Welsbach Street Lighting Company of America and Arthur E. Shaw, move to dismiss the bill on the following grounds:

First. The bill fails to state a cause of action.

Second. The court has no jurisdiction to grant the relief prayed for.

Third. Failure to comply with equity rule No. 27.

The relief prayed for by the complainant is that the defendants, other than the Consolidated Street Lighting Company, may be decreed to pay over to [104] said company the sum of $3,000,000 treble damages under section 7 of the Anti-Trust Law, and the costs of this action.

The bill alleges that the complainant is a stockholder in the defendant, the Consolidated Company, and, prior to 1906, the defendants, other than said company, entered into a conspiracy to control, throughout the United States, the business of securing contracts for municipal lighting and supplying lamps and other lighting accessories. This conspiracy was, it is alleged, carried out by organizing other, rently independent and competing, companies, but which were the control of the defendants other than the Consoli- asserted that by means of such dummy corpo-

rations, the conspiring defendants endeavored to monopolize interstate commerce in the materials necessary for carrying out public lighting contracts. That these defendants, realizing that the Consolidated Company would be a strong competitor in the business of municipal lighting, agreed and conspired together to prevent the Consolidated Company from carrying on such business in the United States and to drive said company out of business. It is alleged further that, in pursuance of the said conspiracy, the said defendants acquired, through fraud and fraudulent representations, a majority of the stock in said Consolidated Company and placed in control thereof creatures of their own and adopted every method in their power to wreck and destroy the said Consolidated Company. That they succeeded in accomplishing this result and, in 1910, caused the Consolidated Street Lighting Company to discontinue its operations and abandon its business; the result being that the business has been destroyed and the stock is worthless. The bill also alleges that prior to this suit, the plaintiff demanded of the officers of the Consolidated Company that they would bring an action asking relief similar to that now demanded, but they have refused to bring such action. It is alleged that but for the unlawful acts of the defendants, the property, good will, and assets prior to the commencement of this suit would have been worth $1,000,000.

The foregoing statement shows sufficiently the intent and purpose of the action.

The question presented by these motions, briefly stated, is whether, when it appears that a number of individuals and corporations have conspired together to wreck a corporation and have succeeded in doing so, a single minority shareholder of such corporation, after the directors and majority shareholders have declined to act, can maintain a suit in equity and recover threefold damages against the conspirators under section 7 of the Anti-Trust Act.

So far as the seventh section of the act is concerned, it has been uniformly construed to refer only to an action at law. It permits a person—which word, by the eighth section, includes a corporation—to bring an action at law to recover treble damages. Nowhere in the act is the right given to an individual to proceed in equity. *Blindell* v. *Hagan* (C. C.), 54 Fed. 40; s. c., 56 Fed. 696, 6 C. C. A. 86; *Greer, Mills & Co.* v. *Stoller* (C. C.), 77 Fed. 1; *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 Fed. 407, 30 C. C. A. 142; *National Fire Proofing Company* v. *Mason Builders' Association et al.*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

In *National Fire Roofing Co.* v. *Mason*, cited above, the Circuit Court of Appeals for this circuit said, at page 263 of 169 Fed., at page 539 of 94 C. C. A. (26 L. R. A. [N. S.] 148):

"With respect to the Federal statute, it is not obvious in what way a trade agreement between builders and bricklayers, relating to their work in the State of New York, can be said to directly affect

Opinion of the Court.

interstate commerce; but the consideration of this question is not necessary, because a person injured by a violation of the Federal act cannot sue for an injunction under it. The injunctive remedy is available to the Government only. An individual can only sue for threefold damages."

These authorities would seem to dispose of these motions. An individual cannot maintain a suit in equity under the Anti-Trust Act. The complainant is an individual, and this is such a suit. An individual can sue only for threefold damages under the act, and this must be in a suit at law. The complainant here is suing for threefold damages in a suit in equity. The defendants are entitled to have the facts passed on by a jury, but here they **[105]** are deprived of such right. In short, the complainant is asking relief under a statute the provisions of which he has failed to follow.

The Consolidated Company could bring an action at law under the permission implied in section 8, but where in the law is the right given to a single shareholder to maintain such an action? A law which grants such drastic relief must be strictly construed; the right to maintain an action not mentioned in the law cannot be implied. It will not do to say that the extraordinary remedy here invoked is necessary and should be implied. If such tremendous power is to be given a single shareholder, the appeal should be made to the legislative and not the judicial branch of the Government. It is unnecessary to determine whether a single shareholder can maintain an action at law under the seventh section for the reason that this is not such an action. Other questions have been discussed, but I do not deem it essential or wise to extend this decision beyond the precise point involved.

What I decide is that an equity suit cannot be maintained under section 7 of the Anti-Trust Act by a single stockholder to recover threefold damages for injuries sustained by his corporation.

The motions to dismiss the bill are granted.

Hirsch, Scheuerman & Limbury, of New York City (*Henry L. Scheuerman*, of New York City, of counsel), for appellant.

Hatch & Sheehan, of New York City (*Edward W. Hatch*, of New York City, of counsel), for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM.

The opinion of Judge Coxe, sitting in the District Court, which sufficiently sets forth the allegations of the bills and in wh[illegible] be found above.

Syllabus.

[1] We are clearly of the opinion that an action to recover treble damages under section 7 of the act must be an action at law, where defendants have the constitutional right to a jury trial.

[2] The sole relief prayed in these bills is that the defendants, other than the Consolidated Company, be decreed to pay over to the Consolidated Company treble the damages it has sustained by some violation of the Sherman Act. We find no authority which gives to a court of equity the jurisdiction to make such a decree. There is no prayer for relief which would warrant such a construction of the bill as would merely require the Consolidated Company to sue the other defendants for treble damages under the statute.

We think the dismissal was proper and affirm the decrees, with costs.

FLEITMANN, SUING ON BEHALF OF STOCKHOLDERS OF THE CONSOLIDATED STREET LIGHTING COMPANY, *v.* WELSBACH STREET LIGHTING COMPANY.[a]

SAME *v.* SHAW.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

[240 U. S., 27.]

Nos. 145, 146. Argued December 17, 1915.—Decided January 24, 1916.

When the penalty of triple damages is sought under § 7 of the Anti-Trust Act the liability can only be enforced through the verdict of a jury in a court of common law.[b]

While under the act of October 15, 1914, private parties can obtain an injunction against threatened loss, that act, in terms, goes no farther.

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[a] For opinion of Circuit Court of Appeals (211 Fed. 103), see *ante*, page 425.

A suit in equity by a single stockholder of a corporation against that and other corporations to require the latter to pay to the former threefold damages under § 7 of the Sherman Act cannot be maintained, nor, in such a case, can there be a decree requiring the corporation of which plaintiff is a stockholder to sue the other corporations or permitting him to sue in its name and on its behalf.

211 Fed. Rep. 103, affirmed.

The facts, which involve the right of a single stockholder to maintain a suit against the corporation under § 7 of the Sherman Act, are stated in the opinion.

Mr. Henry L. Scheuerman, with whom *Mr. Henry A. Wise* and *Mr. Harry F. Mela* were on the brief for appellant.

Mr. Edward W. Hatch, with whom *Mr. William F. Sheehan* was on the brief, for appellees.

Mr. Justice HOLMES delivered the opinion of the court.

This is a bill by a stockholder of the Consolidated Street Lighting Company, against that company and a number [28] of other corporations and individuals, to compel the defendants other than his own company to pay to the latter threefold damages under the Sherman Act. July 2, 1890, c. 647, § 7; 26 Stat. 209, 210. According to the allegations the other defendants conspired to control the business of municipal lighting, &c., throughout the United States and in pursuance of their conspiracy procured their agent to purchase from the former owners a majority of the stock in the plaintiff's company, and then proceeded to ruin it and drive it out of business by misconducting its affairs. The plaintiff has demanded of his company and its officers to institute proceedings but they have refused. The bill was dismissed by the District Court on motion of the appellees in the two appeals before this court, and the decree was affirmed by the Circuit Court of Appeals. 211 Fed. Rep. 103. 128 C. C. A. 31.

The bill alleges in terms that it is brought to recover threefold the damages alleged; a decree for such damages was the dec[illegible] error assigned on

appeal to the Circuit Court of Appeals was holding that such a suit in equity could not be maintained by a single stockholder; that was the only question dealt with by the District Court and that was the ground of decision in the Circuit Court of Appeals. It really is the only question in the case.

Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. Therefore the inquiry at once arises why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue—how the liability which is the principal matter can be converted into an incident of the plaintiff's domestic difficulties with the company that has been wronged.

No doubt there are cases in which the nature of the [29] right asserted for the company, or the failure of the defendants concerned to insist upon their rights, or a different State system, has led to the whole matter being disposed of in equity; but we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary it plainly provides the latter remedy and it provides no other. *Pollard* v. *Bailey*, 20 Wall. 520. Even the act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737, passed since this suit was begun, does not go farther in terms than to give an injunction to private persons against threatened loss.

It now is suggested, evidently as an afterthought since the decision in the District Court, that there might be a decree directing the corporation to sue or, if it fails to do so, permitting the plaintiff to sue in its name and on its behalf. But the bill is not framed for that purpose, as the court below held.

Decree affirmed.

Mr. Justice McKenna and Mr. Justice Pitney dissent.

Syllabus.

PAINE LUMBER CO., LIMITED, ET AL. v. NEAL ET AL.[a]

(District Court, S. D. New York. November, 1913.)

[212 Fed. Rep., 259.]

Conspiracy (§ 8)—Combination in Restraint of Trade—Right to Sue—Third Persons.—At common law a third person had no right of action for damages because of an agreement or combination in restrain of trade.[b]

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7–11; Dec. Dig. § 8.]

Conspiracy (§ 8)—Agreements in Restraint of Trade—Enforcement.—In a suit to restrain the enforcement of an agreement in restraint of trade, it is not sufficient at common law to show that an agreement may create a monopoly, may be in restraint of trade, or may be opposed to public policy, since, agreements of that nature being unenforceable, the law will not aid their enforcement, but they are not illegal in the sense of giving a right of action to third persons for injuries sustained.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7–11; Dec. Dig. § 8.]

Injunction (§ 114)—Agreements in Restraint of Trade—Sherman Anti-Trust Act—Enforcement.—Though an agreement between members of certain carpenters' and woodworkers' unions binding their members not to work with building trim manufactured in non-union factories was in restraint of trade, and in violation of the Sherman Anti-Trust Law (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], and General Business Law N. Y. (Consol. Laws, c. 20) § 340, prohibiting such agreements, a suit to enjoin the enforcement thereof could be maintained only at the instance of the United States or the State of New York, and not by a third person injured thereby.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202–220; Dec. Dig. § 114.]

Conspiracy (§ 30)—Prevention of Competition—"Act Injurious to Trade."—Penal Law N. Y. (Consol. Laws, c. 40) art. 54, § 580, subd. 6, provides that, if two or more persons conspire to commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor. *Held*, that the gist of the offense is an agreement to prevent competition regardless of the in[**260**]tention of the

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[a] For opinion of Circuit Court of Appeals (214 Fed. 82), see *post*, page 445. For opinion of Supreme Court see volume 6, page —.

parties; the prevention of competition in business being an "act injurious to trade" within the statute.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 53-57; Dec. Dig. § 30.]

INJUNCTION (§ 114)—COMBINATION IN RESTRAINT OF TRADE—RIGHT TO SUE.—Though an agreement between certain carpenters' and woodworkers' unions to refuse to use building trim manufactured in non-union factories was in restraint of trade and constitutes a misdemeanor in violation of Penal Law N. Y. (Consol. Laws, c. 40) art. 54, § 580, subd. 6, prohibiting a conspiracy to commit acts injurious to trade or commerce, a private individual was not entitled to a suit to restrain the enforcement of such agreement, in the absence of proof that it was aimed at or affected him injuriously as distinguished from the general public.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.]

In Equity. Suit by the Paine Lumber Company, Limited, and others, against Elbridge H. Neal and others. Bill dismissed.

Austin, McLanahan & Merritt, of New York City (*Walter Gordon Merritt*, of New York City, and *Daniel Davenport*, of Bridgeport, Conn., of counsel), for complainants.

Bidlitz & Hulse and *William Butler*, both of New York City (*Frederick Hulse*, of New York City, of counsel), for defendants Members Mfg. Woodworkers' Ass'n and another.

Charles Maitland Beattie and *William P. Maloney*, both of New York City, for defendants Neal and others.

Charles J. Hardy and *Frederick P. Whitaker*, both of New York City, for defendant James Elgar, Inc.

MAYER, District Judge.

Contemporaneously with the final hearing of this suit, *Irving* v. *Joint District Council*, 209 Fed. 471, was argued on final hearing before Judge Ward. In that case equitable relief was sought on behalf of a single firm because of acts claimed to be specifically directed against that firm pursuant to a combination or conspiracy and resulting in damage to it.

Opinion of the Court.

Here both the complaint and the relief sought are more comprehensive. There is no question involving an existing strike. The record is barren of any proof of acts of violence, nor is there satisfactory proof that the agreements and acts complained of were, at the time of the commencement of the suit, directed against these particular complainants. Plainly and briefly stated, the suit is brought on behalf of non-union manufacturers to settle in a private litigation an economic question of ceaseless importance in respect of which in the particular trade here involved there has been a long and bitterly (though peacefully) fought struggle; each side contending for what it believed to be its rights and welfare.

The bill was verified in February, 1911, and process was duly served shortly thereafter.

The complainants, eight in number, and residents of States other than New York, are manufacturers of wood trim, sash, and other similar wood products. Six of these complainants have and have had [261] business with customers in New York, and two allege that they are ready and able to dispose of their products in New York City if the channels of commerce are kept free from unreasonable obstruction.

Twenty-four defendants named in the bill are alleged to be officers or agents of a voluntary association, known as the United Brotherhood of Carpenters and Joiners of America. Huber, the president, and Duffy, the secretary of the association, were not served with process, and are therefore not before the court. The other twenty-two defendants, representatives of labor, are sued individually and as officers or agents of an association known as the Joint District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America. Five defendants are union manufacturers of trim, door, and sash in New York City. The remaining defendants, over one hundred in number, are master carpenters whose business is to install trim, doors, sash, and other woodwork in buildings.

The bill of complaint sets forth, among other things, an agreement between the Master Carpenters and the Joint District Council (Exhibit B). The object of that agreement is:

"To prevent any strike or lockout, and to insure a peaceable adjustment and settlement of any and all grievances, disputes, and differences that may arise between any employer in the Master Carpenters' Association and the mechanics affiliated with the Joint District Council of Greater New York."

The agreement sets out the terms upon which the employers will employ and the employés work, and provides for the arbitration of disputes. It is one of these terms (which the parties have settled upon) to which complainants object. It reads:

"There shall be no restriction against the use of any manufactured material except non-union or prison-made."

The bill likewise sets forth an agreement between Manufacturing Woodworkers' Association and the Joint District Council (Exhibit C). The purpose of the agreement is thus stated:

"The intent of this agreement is to lay foundation for peace in the mill work industry, and the bringing about of uniformity as to hours, wages, and general conditions, and to provide for the settlement of any and all grievances that may arise between the Manufacturing Woodworkers' Association, parties of the first part, engaged in the manufacturing of doors, sashes, window frames, molding, interior trim, etc., and the International Union, United Brotherhood of Carpenters and Joiners of America, general offices, Indianapolis, Indiana, and its subordinate union known as Joint District Council of New York, parties of the second part."

The arbitration of disputes is provided for, and the agreement further sets forth the terms and conditions upon which work will be carried on. The important provisions to be noticed are one whereby the unions agree "that none of their members will erect or install non-union or prison-made material," and another whereby the employers agree that the members of the Brotherhood of Carpenters are "to be employed exclusively in the mills of the Manufacturing ...kers' Association."

... offense alleged in the bill (Complt., par. 26) ... the exception of the "contractors" (the Master

Carpenters), all the defendants "have for many years past been engaged in an oppressive [262] and malicious scheme or conspiracy to prevent the pursuit or exercise of the trade of carpentry by any person in any State of the United States who is not a member of said United Brotherhood and one of its subordinate bodies, and contrary to the laws of Congress of July 2, 1890, relating thereto, and the laws of the State of New York, to prevent and restrain each of your orators and all other employers of any carpenters not belonging to said brotherhood from engaging in interstate trade or commerce to sell or supply goods for sale, delivery, use, and installation where outside of the State of their manufacture, because they so employ one or more carpenters who are not members of said brotherhood, and to thereby compel and coerce each of your orators and all other woodworking mills and employing carpenters or builders in the United States of America, by the injury so unlawfully inflicted on their respective businesses, to operate what is called a closed or union shop, and to discharge and refuse to employ any carpenter who is not a member of and does not pay tribute to and submit to the regulations and restrictions of said United Brotherhood and some one of its local affiliated unions."

The Master Carpenters being excepted from the charge of conspiracy, the charge is therefore made only against the 22 agents of the Joint District Council, the 4 members of the Woodworkers' Association, and David W. O'Neil.

It is further alleged that in pursuance of and for the purpose of making effective the combination and conspiracy:

1. The brotherhood and Joint District Council have adopted the rule that no member of the brotherhood should use or work upon non-union trim, and a violation of the rule subjects the member to the penalty of a fine. This allegation is admitted.

2. The brotherhood has an understanding with the other trades that such trades will join in sympathetic strikes if requested so to do where non-union trim is being used. This is denied by the representatives of the unions and not established.

3. The alleged conspirators have instigated and joined in strikes where the complainants' materials were being used. This is denied, except that it is admitted in the answer of the Joint District Council's agents that members of the brotherhood have refused to work on the complainants' products. The testimony shows that on several occasions members of the brotherhood have quit work on jobs when complainants' material was being used.

4. Builders and architects have been coerced by fear of strikes caused by the conspiracy of certain of the defendants to refuse to purchase complainants' products. This is denied by the labor defendants. It is entirely clear from the record that the known attitude of the union toward non-union trim has deterred owners and builders who wish to employ brotherhood men to erect trim from purchasing that which they refuse to erect, and this course has been taken for self-protection and in view of the exigencies of this trade situation.

5. The Joint District Council would not enter into any agreement with the Master Carpenters until some clause enjoining the use of non-union material was inserted, and the Master Carpenters were coerced [263] to enter into the agreement (Exhibit B). The Master Carpenters answer that the representatives of the workmen insisted upon a clause substantially as is contained in the agreement, but they and the labor defendants deny that the carpenters were coerced into making the agreement. The situation disclosed amounts to all intents and purposes to coercion even though the purpose of the Master Carpenters was commendable and to accomplish industrial peace.

6. The agreement (Exhibit C, supra) between the Woodworkers and Joint District Council was made. This allegation is admitted.

7. "Unfair lists" have been circulated among architects, builders, and contractors of New York City. This is denied, and there is no proof of any instances where complainants have been placed on "unfair lists."

8. Printed lists containing the names of firms and corporations who employ union labor in their mills have been

circulated in New York City by the alleged conspirators preceded by a statement whose purpose was to indicate the desirability of employing union men in order to avoid labor troubles. The labor defendants admit that such lists have been prepared and in some cases preceded by the statement above referred to, but assert that the use of such statement had been discontinued before the commencement of this action. No proofs were submitted disproving that assertion.

The testimony is voluminous, but I think the essential facts may be summarized as follows: (1) The journeymen carpenters in the Borough of Manhattan and in parts of the Borough of Brooklyn very generally belong to the Brotherhood of Carpenters. (2) Owing to the fact that members of the brotherhood refuse to work with non-union members and to the further fact that employers in the building trades deem it wise to employ brotherhood men, it is difficult, and under ordinary circumstances impracticable, to erect carpenter work in the Borough of Manhattan and in parts of the Borough of Brooklyn except with union labor. (3) That the Brotherhood of Carpenters has a by-law that its members will not erect material made by non-union mechanics. (4) The Brotherhood of Carpenters has given notice that its men will abide by this by-law. (5) The by-law is enforceable by fine. (6) On several occasions in the past few years the members of the brotherhood have quit work where complainants' products were being used and where the products of other so-called non-union mills were being used. (7) The enforcement of the by-law in question by the Brotherhood of Carpenters and the provision in the agreement with the master carpenters relative to the use of non-union trim have lessened the sale of complainants' products in the Borough of Manhattan and in some parts of the Borough of Brooklyn. (8) The workmen have adopted and pursued the policy complained of to better their condition in a continuing economic struggle, with no malice to the particular complainants herein, but as part of a plan to accomplish a nation-wide unionization in their trade. (9) The contractors or master carpenters have entered into

their trade agreements after elaborate negotiation and for the purpose of establishing and maintaining peaceful relation which shall obviate strikes and other disturbing labor troubles.

[264] The relief sought by complainants is:

1. That the defendants (other than the Master Carpenters) be enjoined from "combining, conspiring, and confederating together to refuse to handle or work upon material produced or manufactured by the complainants, or any of them, because they are not made under union conditions, and from publishing, circulating, enforcing, and attempting to enforce the provisions of the by-laws of the District Council of New York and vicinity, which provide as follows: 'Any member proven guilty of using the products of any person, firm, or mill who have been declared unfair by their district council, or working for any person, firm, or mill who have thus been declared unfair, shall be fined $10 per each offense.' And from publishing, circulating, enforcing, and attempting to enforce that part of the by-laws of the United Brotherhood of Carpenters and Joiners of America which provide as follows: 'It shall be the duty of all district councils and local unions wherever possible to prevent the members under their jurisdiction from encouraging the use of any unfair material by handling the same.' And from enforcing or attempting to enforce or inflicting or threatening to inflict any injury, penalty, or liability, where in the nature of a fine or suspension or expulsion from any labor organization, or otherwise, against any person who works upon materials furnished by any of your complainants, or against any person who works for any employer who purchases materials from any of your complainants, or against any person who works upon any building where the materials of any of your complainants are being installed or about to be installed. From inducing or attempting to induce any person or persons whomsoever to decline employment or cease employment, or not to seek employment under any person, firm, or corporation, because such person, firm, or corporation may have purchased or proposed to purchase materials from the complainants or any of them, or because of materials furnished by the complainants or some of them were being used on or in connection with some building where said persons are doing work, and from in any way inducing or attempting to induce any person or persons to refuse to install, handle, or work upon materials manufactured by your complainants, or any of them. And from making, communicating, or circulating any statement, orally or in writing, that the defendants, or members of any union of workingmen, will refuse to work upon any material unless said materials are constructed under strict union conditions. And from requesting customers, or those who might become customers of the complainants, not to purchase the products of your orators, or any of them, because

Opinion of the Court.

they do not employ members of said United Brotherhood of Carpenters and Joiners of America exclusively at the work of carpentry, or do not use the union label of said United Brotherhood, and from requesting any persons who might be customers of the complainants, or any of them, to buy union materials, so that no controversy or difficulty can arise on account of the use of non-union woodwork. From giving notice, verbally or in writing, to any person, firm, or corporation to refrain from purchasing merchandise or carrying out contracts for the purchase of merchandise manufactured by your complainants, or any of them, under threats that if such merchandise is purchased, or said contracts carried out, they will cause the person so notified loss or trouble, or that they will cause persons employed by such persons so notified to withdraw from their employment, or that they would cause persons employed by others upon buildings where said persons so notified are doing work to withdraw from all work upon said buildings. From publishing, circulating, or otherwise communicating, either directly or indirectly, in writing or orally to each other or to any other person, firm, or corporation, any statement or notice of any kind or character whatsoever calling attention to the fact that the complainants, or any of them, or their products, or any of them, are or were or have been declared unfair, or are on any unfair list, or that your complainants, or any of them, should not be patronized or dealt with, or their products purchased, used, handled, worked upon, or dealt in because made in an open or non-union shop. And from conspiring, agreeing, or combining together to restrain or destroy the interstate business or trade of the complainants, or any of them, in order to compel them to refuse to employ any carpenters who are not members of said United **[265]** Brotherhood, and from doing any and all acts in furtherance of said combination, and any and all acts to interfere with or discourage the sale or disposition of the products of the factories of the complainants, or any of them, or the installation or handling thereof, for the purpose of compelling the complainants, or any of them, to refuse to employ any carpenters who are not members of said United Brotherhood. And from using any and all ways, means, and methods of doing any of the aforesaid forbidden acts and from doing any of the forbidden acts, either directly or indirectly, or through by-laws, orders, directions, or suggestions to committees, associations, officers, agents, or otherwise.

"2. That section 2 of article 4 and the second paragraph of article 3 of said agreement (Exhibit B), entered into on or about the 30th day of October, 1909, between the Master Carpenters' Association of the city of New York, party of the first part, and the Joint District Council of Greater New York, party of the second part, be declared void as imposing an unlawful restraint upon trade, contrary to the laws of the State of New York in such case made and provided, and contrary to the laws of the United States relating to restraints of

interstate commerce, and as constituting a part of the wrongful combination or conspiracy to injure your orators.

"3. And that the parties to said agreement (Exhibit B), their attorneys, agents, and associates, be enjoined from carrying out or pursuing said section 2 of article 4 and the second paragraph of article 3 of said agreement so far as the same forbid the purchase, use, or installation of products manufactured by any of your orators, and inducing or persuading, or attempting to induce or persuade, any person, firm, or corporation to extend, renew, observe, carry out, or comply with the terms of said section 2 of article 4 so far as the same prohibit the purchase, use, or installation of non-union woodwork by the members of the Master Carpenters' Association and provide for the refusal of the members of said district council to work upon the same."

At the outset the jurisdiction is attacked because of lack of necessary diversity of citizenship; but that question, I think, is disposed of in this court by the order of Judge Coxe for a preliminary injunction and by Judge Ward's opinion in 180 Fed. 896. I think there is grave doubt as to whether the relief prayed for in paragraph 2, supra, can be granted in a private suit to which the Joint District Council, one of the signers of the agreement, Exhibit B, is not a party. It will also be noted that, while the effect of Exhibit C is sought to be restrained, there is no application to declare void the agreement itself. Counsel, however, on the argument urged a decision on the substantial questions involved, and the importance of the subject matter invites such a decision.

For the complainants to succeed they must establish: (1) An agreement offensive to the common law or a State or Federal statute; (2) or any acts done in pursuance thereof; and (3) such injury as will warrant injunctive relief in a litigation between private parties.

[1] Assuming the agreement and its operation to be a combination in restraint of trade, the common law gives no right of action to a third person.

[2] "In considering the legal questions arising in this case, it must be borne in mind at the outset that it is not sufficient to show that the agreement in question may create a monopoly, may be in restraint of trade, or may be opposed to public policy. Agreements of that nature are invalid

Opinion of the Court.

and unenforceable. The law takes them as it finds them, and as it finds them leaves them; but they are not illegal in the sense of giving a right of action to third persons for injuries sustained." *Nat. Fireproofing Co.* v. *Mason Builders' Ass'n*, 169 Fed. at page 263, 94 C. C. A. 539, 26 L. R. A. (N. S.) 148.

[266] [3] The remedy, if any, must therefore be found in statutes which, as I understand the trend of modern decisions, are said to be declaratory of the common law, but afford new or additional remedies. This brings us to a consideration of the Federal so-called Sherman Anti-Trust Law and the New York State Anti-Trust Law (General Business Law, § 340). I agree with Judge Ward, in his opinion filed contemporaneously herewith, that:

"There can be no question, first, that a combination does exist between the various local unions which constitute the United Brotherhood; second, that one of the purposes of the combination is to compel the unionization of all manufacturing carpenter shops; third, that the object is to restrain competition between open shops and union shops; and, fourth, that this object is to be accomplished principally by an agreement to refuse to work on any job where non-union trim is used."

I further agree that the combination in the case before him results in directly restraining competition between manufacturers and operates to restrain interstate commerce in violation of the above referred to Federal and State statutes.

As the agreement (Exhibit B) between the Joint District Council and the Master Carpenters and the agreement (Exhibit C) between the Manufacturing Woodworkers' Association and the United Brotherhood and the Joint District Council are but steps in the course of the combination and effective extensions of its purpose and results, I am of the opinion that these agreements are also condemned by the two statutes referred to—and this irrespective of the motives which actuated any of the defendants, masters or workmen.

But injunctive relief may be had under either statute only at the instance of the United States or the State of New York, as the case may be, and therefore complainants can-

not recover in this suit. *Nat. Fireproofing Co.* v. *Mason Builders' Ass'n, supra.*

[4] As I cannot agree with the contention of the counsel for complainants that either sub-division 5 of section 580 or section 530 of the Penal Law is applicable to the case at bar, there thus remains for consideration only sub-division 6 of section 580 of the Penal Law of New York. Sub-division 6 of section 580 of article 54 of the Penal Law (formerly section 168, subd. 6, of Penal Code) has long been on the statute book. It provides:

"If two or more persons conspire to commit any act injurious * * * to trade or commerce * * * each of them is guilty of misdemeanor" (formerly part of section 168 of the Penal Code).

The prevention of competition in business has been held to be an act injurious to trade in contemplation of law. *Kellogg* v. *Sowerby*, 190 N. Y. 370, 83 N. E. 47; *People, etc.*, v. *Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690.

It is further held by the New York Court of Appeals:

"A civil action is maintainable by one who suffers injury as the result of a conspiracy forbidden by the criminal law to recover the damages which he has sustained at the hands of the parties to the combination."

See, also, In re Debs, 158 U. S. at page 593, 15 Sup. Ct. 900, 39 L. Ed. 1092.

[267] Under this statute the motive of the parties is immaterial. The gist of the offense is the agreement to prevent competition.

"In order to guard against any possible misapprehension, however, on another trial, it is proper to say that we do not think that good motives on the part of those who enter into a combination in restraint of trade save it from the combination of the law of this State. *People* v. *Sheldon, supra.* The fact that the parties to an agreement of such a character may have honestly believed that it would be beneficial instead of injurious to commerce does not render it legal. The law denounces it if it is designed to prevent competition and will have that effect whatever the intent of the parties." *Kellogg* v. *Sowerby. supra.*

[5] Without wishing to speculate obiter, it would seem that, if there be a conspiracy to commit any act injurious to

Opinion of the Court.

trade or commerce, the offense is indictable, irrespective of injury to a particular person. The theory is that the people at large are injured and the redress is in their hands, acting through constituted authority. But before a private litigant may recover he must show either that he has suffered special injury as the proximate result of the wrong or that the conspiracy was directed against him. *Cranford* v. *Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Kellogg* v. *Sowerby*, *supra*; *National Fireproofing Co.* v. *Mason Builders' Association*, *supra*. As I read the Kellogg case, there might have been a criminal prosecution because of the agreement, irrespective of Kellogg's rights or status; but Kellogg could not recover money damage if it could be shown that, at the formation of the conspiracy, it was not intended to injure him. Conspiracy is a continuing crime, however, and, once the agreement is formed, it seems to me that if particular acts are directed against a particular person so that he suffers a direct or special injury, he is the victim of a conspiracy and, however impersonal the original situation may have been, the intent to injure may be inferred from the fact that injury is directly inflicted by specific acts on the particular person and in pursuance of the agreement to do acts to injure trade or commerce by preventing competition. But the public generally, as distinguished from one specifically injured, must look to the sovereign for redress. So, here, it is true that the complainants may be injured by the general situation; but theirs is not a special injury in the sense of *Cranford* v. *Tyrrell*, *supra*, nor of the Irving case. Assuming, for the purpose of illustration, the agreement complained of to be unlawful, it was impersonal and intended to accomplish a general result as distinguished from selecting these particular complainants as the object of its operation. *National Fireproofing Co.* v. *Mason Builders' Association*, *supra*.

In such circumstances the policy of the lawmaking power (here Congress and the New York Legislature) seems to be to remit these problems to the responsible and duly selected public officials. A decree in a litigation at the instance of the Government or the State is binding universally to all practical intents and purpos

Syllabus.

the public interest as distinguished from any individual interest and operates for the benefit of all (as distinguished from meeting a particular instance of wrong or injury) on a method or manner of conducting business, whether the complaint be against employer or employé.

Of the many cases cited I find none authoritative where a general [268] business situation in the case of employers or a general trade situation in the case of employés was corrected by injunction at the instance of private suitors. Ample remedy is provided at common law or by statute for recovery of money damage in actions by private litigants. The courts have time and again extended the equity arm to prevent the commission or continuance of injury directed against particular persons and have protected employers against violence and sympathetic strikes; but where the purpose of an injunction is, as in the case at bar, to attempt to control a large body of men generally to work or not to work on a class of goods or in a kind of manufacture (as distinguished from a specific instance or instances as above discussed), the remedy of injunction is not to be granted in a litigation between private parties.

Finally, it may be remarked that, in any event, on this branch of the case, the complaint does not seek an injunction against the Master Carpenter nor does the proof justify the granting thereof.

The bill is dismissed, with costs.

PAINE LUMBER CO., LIMITED, ET AL. v. NEAL ET AL.*

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

[214 Fed. Rep. 82.]

MONOPOLIES (§ 24)—AGREEMENT IN RESTRAINT OF TRADE—INJUNCTION—RIGHT TO RELIEF.—The carrying out of an agreement in violation of Federal or State anti-trust laws, or otherwise in restraint of trade, will not be enjoined at suit of a private party, not shown

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* For opinion of District Court (212 Fed. 259), see *ante*, page 432. opinion of the Supreme Court, see volume 6, page —.

to have been the direct object of such agreement or to have suffered special damages.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from a decree of the District Court, Southern District of New York, dismissing a bill in equity brought by eight corporations, located in other States and engaged in the manufacture of wood trim used in the erection of buildings. The defendants [83] are the officers or agents of the United Brotherhood of Carpenters and Joiners, five union manufacturers of wood materials, operating closed shops in competition with complainants' open shops, and a hundred or more boss carpenters or builders, all of whom are members of the Master Carpenters' Association of the City of New York engaged in the work of building in that city. Relief is prayed in the shape of an injunction to restrain all the parties defendant from acting under certain agreements into which they have entered, which agreements prevent the use of complainant's non-union-made trim in buildings constructed in said city. It is the contention of the complainant that these agreements violated the common law, the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), the State Anti-Trust Act (Consol. Laws, c. 20, §§ 340-346), and sub-division 6 of section 580 of the Penal Law of the State of New York (Consol. Laws, c. 40).

The opinion of the District Judge will be found in 212 Fed. 259. It held that the agreements violated these laws, but that the complainants did not suffer special damage and were not entitled to private relief.

W. G. Merritt, of New York City, for appellants.

W. P. Maloney, *C. M. Beattie*, and *F. Hulse*, all of New York City, for appellees.

Syllabus.

Before LACOMBE, ROGERS, and HUNT, Circuit Judges.

PER CURIAM.

We agree with Judge Mayer that, since it clearly appears—indeed, the proposition is not disputed—that defendants' acts were not malicious nor personally directed against the individual complainants, injunctive relief, which is all they pray for, cannot be granted in this suit. The bill was therefore properly dismissed. Any discussion of the other questions raised, viz, whether the particular agreements or combinations are obnoxious either to the common law or to one or more of these statutes, would be academic and need not now be entered into.

The decree is affirmed, with costs.

UNITED STATES *v.* WHITING ET AL.

(District Court, D. Massachusetts. March 23, 1914.)

[212 Fed. Rep., 466.]

MONOPOLIES (§ 31)—INDICTMENT—RESTRAINT OF TRADE—PRICE AGREEMENT.—An indictment alleging that the defendants, who bought 86 per cent of the milk sold in specified country districts by the producers there for shipment to Boston and vicinity and Worcester, engaged in an unlawful combination in undue restraint of trade by agreeing upon the prices which they would pay for milk at the country points, thereby eliminating competition as to price between the defendants, *held* to show a combination which was prima facie unreasonably extensive and therefore illegal.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 31)—COMBINATION IN RESTRAINT OF INTERSTATE TRADE—INDICTMENT.—An indictment which charges a combination in restraint of interstate trade in milk, and which alleges that defendants combined to eliminate competition between themselves as to the price of milk purchased for resale in Boston and Worcester, and that the milk purchased by them was purchased in Maine, Vermont, New Hampshire, Connecticut, and Massachusetts is not defective for failing to allege a restraint of interstate trade [467] in milk, merely because it does not allege what proportion of the milk

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Syllabus.

purchased under the combination came from outside Massachusetts, since the milk purchased in Massachusetts was purchased for the purpose of adding it to milk forming a part of interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 29)—ANTI-TRUST ACT—REASONABLE RESTRAINT OF COMPETITION DEFINED.—Under the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), there must be not only a restraint of trade, but an undue restraint to support a conviction for combining in restraint of trade, and, to make a restraint unreasonable, it must appear either that the normal volume of interstate trade has been interfered with by artificial agencies affecting to a substantial degree, and to the disadvantage of the public, the price or supply of the commodity, which is the subject of the restraint, or that by means of a combination the price or supply of the commodity is or may be affected to a substantial extent to the disadvantage of producers or purchasers, thereby operating to a material degree to the injury of the public, or that there has been a direct and intentional interference with the transportation of commodities in interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. § 29.]

MONOPOLIES (§ 31)—ANTI-TRUST ACT—CRIMINAL OFFENSES—LIMITATIONS ON RIGHT OF COLLECTIVE BARGAINING.—Three classes of persons consisting of different individuals were under the control of the individual members of each class. They formed a combination by agreeing to offer and pay no more than a specified price for milk for resale in interstate commerce. The several persons were not guilty of any illegal purpose or of any oppressive methods, and, except as to price, they were free to compete with each other. The price of milk to the producers was lowered by reason of the combination, but to what extent was not shown. Eighty-six per cent of the business of buying milk sold in designated localities for resale elsewhere after interstate transportation was in their hands. *Held*, that whether the combination was an unreasonable restraint of interstate trade in violation of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) was for the jury.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

MONOPOLIES (§ 29)—ACTS CONSTITUTING "MONOPOLY."—A "monopoly" at common law and under the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) implies a control of goods or service which the public desires, and an attempt to monopolize is an attempt to obtain control of an industry by means which prevent others from engaging in fair competition.

Statement of the Case.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. § 29.

For other definitions, see Words and Phrases, vol. 5, pp. 4570–4574.]

MONOPOLIES (§ 8)—"RESTRAINT OF TRADE."—While there can be no monopoly which is not an unreasonable restraint of trade, there may be unreasonable restraints of trade which are not monopolies.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 8.]

MONOPOLIES (§ 29)—ACTS CONSTITUTING MONOPOLY.—Persons engaged in the business of buying milk and selling it at retail in designated localities formed a combination whereby they agreed not to offer or pay more than a specified price for milk purchased by them for **[468]** resale. It did not appear that the combination in any way enlarged their control of the business, either by forcing down the price at which they bought, so that they could undersell competitors in the selling market or otherwise. The agreement was made with the intent to wrong the public and to oppress and limit the rights of milk producers by depriving them of the higher price of milk which would have resulted from free competition. They did not dominate or control the markets in which they sold their milk purchased pursuant to the combination. *Held*, that they were not guilty of attempting to monopolize trade in milk in violation of the Sherman Anti-Trust Act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. §29.]

MONOPOLIES (§ 31)—CONSPIRACY IN RESTRAINT OF TRADE—ELEMENTS.—An indictment charging a conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) must allege facts warranting a finding that the restraint was unreasonable, and an indictment charging a conspiracy in restraint of trade in milk which does not show the percentage of milk bought by defendants for shipment and sale in designated markets, nor allege facts from which it could be inferred that defendants either controlled or were dominating factors in any branch of the milk business, was demurrable for failing to allege an unreasonable restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

Isaac Whiting and others were indicted for violating the Sherman Anti-Trust Law (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Demurrers to indictments sustained in part and overruled in part.

William S. Gregg, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

Samuel J. Elder, of Boston, Mass., and *John F. Cusick*, of Boston, Mass., for defendants Whiting.

Whipple, Sears & Ogden, of Boston, Mass., for defendants Hood.

Sughrue & Chase, of Boston, Mass., for defendant Graustein.

George W. Anderson, of Boston, Mass., for defendant Hunter.

MORTON, District Judge.

These are two indictments against the same defendants for violating the Sherman Anti-Trust Law (26 Stats. 209). Indictment numbered 454 will be first considered. It is in two counts, the first charging a combination in restraint of trade, second an attempt to monopolize trade and commerce in milk.

The allegations of the first count are, in substance, as follows:

The defendants, Isaac Whiting, George Whiting, John K. Whiting, Charles H. Hood, Edward J. Hood, and William Graustein, were, between May 26, 1905, and May 26, 1911 (when the indictment was found), continuously, willfully, knowingly, and unlawfully engaged in a combination in undue restraint of trade and commerce among the several States of the United States by consulting, planning, and agreeing together in the combination hereinafter described in undue restraint of trade, which combination has restrained interstate trade in the manner set forth, and has been with unlawful intent.

[469] The combination is described as follows:

Throughout the period specified, "a very extensive industry" has been carried on in and from the States of Maine, Vermont, New Hampshire, Massachusetts, and Connecticut, involving the *purchase* at divers places in said States of milk from the producers there, and the *shipment* of the milk so purchased to Boston and vicinity and to Worcester, and the sale thereof to various persons; 86 per cent of all the milk

purchased in the States above named, and so shipped to, and sold in, Boston and vicinity and in Worcester, has been purchased, shipped, and sold by three classes of persons, namely, the Whiting class (consisting of the above-named defendants by the name of Whiting), the Hood class (consisting of the above-named defendants by the name of Hood), and the Graustein class (consisting of the above-named defendant Graustein). These classes were under the control of the individual members thereof. In carrying on said industry the defendants shipped from the States named, to the points named, the milk so purchased by them. The Whiting class made purchases from producers at about 128 places throughout said States and shipped the milk so purchased to Boston and vicinity; the Hood class, at 142 places throughout said States, and shipped the milk so purchased to Charlestown, Forest Hills, and Lynn; and the Graustein class, at 92 places, and shipped the milk so purchased to Charlestown. The defendants, as a necessary feature of said industry, have respectively been carrying on interstate trade and commerce. Each class, had it not been for the unlawful combination between them in restraint of trade, would have been affected by the competition of the two other classes in the purchase of milk, and the producers who sold to the defendants would have benefited by such competition. No one class of the defendants had or controlled a majority of said interstate trade in milk, but all of the classes working together did have a majority of that trade, namely, 86 per cent thereof. Of this 86 per cent, the Whiting class controlled 48 per cent, the Hood class 44 per cent, the Graustein class 8 per cent. The defendants directed and controlled this 86 per cent of the milk trade by and through certain copartnerships and corporations of which they were the actual and real managers. The purpose of this unlawful combination was to eliminate competition between the defendants in the purchase of milk from the producers.

The methods by which the defendants accomplished the objects of their unlawful combination and, by agreement between them, knowingly and unlawfully restrained interstate trade, is described as follows:

Opinion of the Court.

The different classes of defendants have, in pursuance of said agreement and combination between them to that end, refrained from competing with each other in the purchase of milk at the places named throughout the States aforesaid, and have conferred and agreed upon uniform prices to be paid by them each six months to the producers of milk for milk so purchased. The defendants, being extensive purchasers of milk, have been able, by reason of said unlawful agreement and combination, to purchase, and in fact have purchased, their milk at prices in the making of which competition has been greatly restricted and which have been much lower than would have been the case had said [470] agreement and combination not existed and had there been competition among the said classes of defendants with each other. The defendants entered into and carried out the agreement and combination described "with the intent to wrong the public and oppress and limit the rights of the milk producers in the States aforesaid by depriving said producers of the higher prices for milk which would have resulted from free and open competition among said defendants, all as aforesaid."

Second count:

The second count is against the same defendants. It incorporates by reference the circumstances and conditions set forth in the first count, and charges that the defendants, by engaging in the unlawful combination described in the first count, "did knowingly attempt to monopolize part of the trade and commerce" among said States, "with the intent to wrong the public and to oppress and limit the rights of the milk producers in the States aforesaid by depriving said producers of the higher prices for milk which would have resulted from free and open competition among said defendants, all as aforesaid."

The gravamen of both counts is a combination among the buyers of milk to eliminate competition inter se as to price only, and thereby to injure persons who had milk for sale.

It will be noticed that the scope of this indictment is narrower than in any previous case under the Sherman Act. Its omissions are significant. It does not undertake to describe

conditions in the milk business generally, either in the country or the city districts. It relates only to milk which is (*a*) bought at specified places in country districts, (*b*) for shipment to and sale in the vicinity of Boston or Worcester. It does not allege the total amount of milk produced and sold at the country places named, nor the total amount shipped therefrom, nor that sale for shipment to Boston or Worcester is the principal, or even an important, market for producers of milk at said places; nor is it alleged that the prices paid there for Boston or Worcester milk established or influenced other prices in the country markets. For example, if at any given place 1,000 gallons of milk were produced, 500 gallons of it might be sent to Springfield, 400 delivered to local creameries or consumers, and 100 sold for shipment to Boston or vicinity. The alleged combination affected only this last amount of 100 gallons. According to the indictment, only 86 gallons out of the 1,000 in the case supposed were bought and shipped by the defendants, i. e., an unimportant portion of the whole amount. The same may be true as to every place mentioned in the indictment; the Boston and Worcester trade, though "very extensive," may take but a small portion of the entire amount produced, and the price of the Boston and Worcester milk may not affect prices generally in the country markets.

It is not alleged that the defendants dominated or controlled the markets where they sold their milk; for aught that appears, they may have been unimportant factors therein. The indictment thus entirely fails to allege a domination or control of prices by the defendants, either in the buying trade in the country, considered as a whole, or in the selling trade in the cities. In does, however, show such domination of **[471]** the buying trade in what is large enough to constitute a "very extensive industry."

No acts are alleged on the part of the defendants calculated to suppress competition from other purchasers, and no unfair or dishonest practices towards producers or consumers, unless the agreement in question be so regarded. It is not alleged that the prices agreed upon or paid were unreasonably low, but only that they were less than would have been the case had said restrictive agreement not been

made. In this respect the present case is very different from the Nash case (*Nash* v. *U. S.*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232), the Swift case (*Swift* v. *U. S.*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518), and the Patterson case (*U. S.* v. *Patterson* [D. C.], 201 Fed. 697).

As to most, if not all, of the places named at which milk was bought, the indictment shows that only one of the classes of purchasing defendants bought there, and it is not alleged that at such points there ever was competition in purchasing by the other two classes of defendants, though it is alleged that there would have been such competition had the agreement covering prices never been made, and that the prices paid at such points were affected by the agreement and were less than would otherwise have been paid. For aught that appears to the contrary, the different classes of defendants may always have operated in distinct and separate districts, without competition among themselves, and have continued so to operate.

It may be true that, in the country places mentioned in the indictment, the most advantageous way to dispose of milk is to sell it for the Boston and Worcester market; that it is impracticable for individual producers to ship milk to Boston or Worcester; and that the three classes of defendants, by establishing prices which they would pay, practically dominated the country market. But that is not the situation described in this indictment.

[1] Each of the defendants has demurred and each has assigned many grounds of demurrer. So far as they are merely formal or technical, they seem to me not well founded. I regard the indictment as sufficient in its technical and formal aspects, and as sufficiently informing the defendants of the offenses with which they are charged.

The defendants contended that the Sherman Act is so indefinite and uncertain as to be unconstitutional as a criminal statute. But this point has been settled otherwise since the arguments, by the decision of the Supreme Court in *Nash et al.* v. *U. S. supra.*

[2] The defendants also contended that the alleged agreement, dealing as it does only with the purchase of milk at the places named, did not directly affect or restrict interstate

commerce. It was pointed out by them that the indictment nowhere alleges what proportion of the milk purchased under said agreement comes from outside Massachusetts. These objections seem to me unsound. The indictment charges a combination with respect to a well-defined trade in milk between Boston and vicinity and Worcester, and several different States; Massachusetts being one of them. It alleges a general agreement with respect to prices in the States of Maine, New Hampshire, Vermont, Massachusetts, and Connecticut. The milk was purchased for the purpose [472] of adding it to an existing current of interstate trade. The purchases in Massachusetts were made in accordance with a broad plan extending beyond the borders of that State. A similar objection was raised by the defendants in *U. S.* v. *Reading Co. et al.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, and was there held unsound.

"Much of the coal so bought," it is said, "was sold in Pennsylvania, and all of the contracts were made in that State, and the coal was also there delivered to the buying defendants. * * * The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other States." *Lurton, J., U. S. v. Reading Co., supra.*

See, also *Lowe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Montague* v. *Lowry*, 193 U. S. 38, 45, 46, 24 Sup. Ct. 307, 48 L. Ed. 608.

Various other minor objections were made to the indictment; but upon the construction which I have given it, none of them is, in my opinion, well founded, or of sufficient importance to require discussion.

[3, 4] The crucial question, as it seems to me, is whether what the defendants are charged with having done constitutes a crime. Does the Sherman Act forbid an agreement among a substantial portion of the buyers in a certain interstate industry as to the price which they will offer or pay for a specified commodity? To reverse the question, is an agreement between a substantial proportion of the farmers in a given district, as to the price which they will charge middlemen engaged in interstate commerce for their milk,

an unlawful combination, in the entire absence of any illegal purpose, or of any oppressive methods, or of any unreasonably high price? To what extent have competitors in interstate business the right to agree upon prices and eliminate competition inter se in respect thereto for their common advantage or protection?

It will be noticed that the indictment discloses no community of interest among the defendants, no general combination between them, no joint action for the purpose of coercing or injuring outsiders, but merely an agreement as to the price which they will offer and pay for milk; and that, except as to price, the defendants are free to compete with each other. It is not alleged that the exact prices agreed upon by the defendants became effective or were accepted by the sellers. The statements in the indictment as to the effect of the alleged combination are very guarded, and aver only that the price of milk to the producers was in fact lowered by reason of it. To what extent it was lowered is not alleged, nor, as before said, is it charged that the price agreed upon and paid by the defendants to the producers was unfair or oppressive; and it is nowhere explicity stated that the sellers were under any sort of compulsion to deal with the defendants. Such compulsion is to be inferred, if at all, from the character and natural results of the alleged combination.

It may be said at once that the case is an exceedingly difficult one; and that the principles upon which it should be decided are by no means clearly settled. Change of opinion concerning the law involved [473] led the United States Supreme Court greatly to modify, if not to overrule, two of its comparatively recent decisions. See comment on Freight Association & Joint Traffic cases by White, C. J., *Standard Oil Co.* v. *U. S.*, 221 U. S. 64, 67, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. And differences of opinion concerning it have occasioned vigorous dissents by members of that court and irreconcilable decisions among other courts. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 343, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Northern Securities Co.* v. *U. S.*, 193 U. S. 364, 24 Sup.

Ct. 436, 48 L. Ed. 679; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 267, 29 Sup. Ct. 280, 53 L. Ed. 486; *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353, 9 N. E. 629 (compare *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.* [C. C.] 166 Fed. 555); *People* v. *Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690 (compare *Skrainka* v. *Scharringhausen*, 8 Mo. App. 522); *Nester* v. *Continental Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rp. 894 (compare *Anheuser-Busch Brewing Ass'n* v. *Houck*, 27 S. W. 692).

Whether an agreement restrains trade is a matter of law for the court to determine. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, 22 L. Ed. 315; Joyce on Monopolies, § 103 (collecting authorities).

That the alleged agreement not only restrained competition but also restrained trade seems clear. *Northern Securities Co.* v. *U. S.*, 193 U. S. 338 et seq., 24 Sup. Ct. 436, 48 L. Ed. 679; *Dr. Miles Medical Co.* v. *Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 238, 20 Sup. Ct. 96, 44 L. Ed. 136; *More* v. *Bennett*, 140 Ill., 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216; *People* v. *Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609; The Legal Aspect of Monopoly, 20 Harv. Law Rev. p. 176 et seq. But that of itself, whatever may be the case at common law (as to which see *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; s. c., 175 U. S. 211, 238, 20 Sup. Ct. 96, 44 L. Ed. 136; Joyce on Monopolies, § 89; and *Harding* v. *Am. Glucose Co.*, 182 Ill.. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189, elaborate notes collecting authorities), is not sufficient to warrant a conviction under the Sherman Act. Under this statute there must be not only a restraint of trade, but an undue restraint. In the Standard Oil case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, it was held, in substance and effect, that the restraint prohibited by the act must be an unreasonable one.

"The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from

Opinion of the Court.

combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint. * * * Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the [474] measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." White, C. J., Standard Oil case, 221 U. S. at page 60, 31 Sup. Ct. at page 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. See, also, Harlan, J., dissenting, at page 102 et seq. of 221 U. S., page 532 of 31 Sup. Ct., 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

In passing upon the question of unreasonable restraint, all the circumstances surrounding the alleged agreement or combination are to be taken into account, and, while the standard of conduct "in its nature and theory is a question of law" (Holmes, J., *Le Roy Fibre Co.* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 232 U. S. 340, 34 Sup. Ct. 415, 58 L. Ed. 631 [February 24, 1914]), where the facts are in dispute the question will ordinarily be one for the jury to decide under suitable instructions.

The case therefore comes down to this: Whether upon the facts alleged in the indictment, which upon this demurrer must be taken to be true, a jury would be warranted in finding that there was an unreasonable restraint of trade by the defendants.

It is not possible to determine whether or not such a restraint of trade as is disclosed in this indictment is unreasonable, without having definitely in mind what constitutes a reasonable restraint of trade. See Stephen's Digest of Evidence (2d Am. Ed. by Chase) Introduction, pp. xvi and xvii. There is as yet no standard clearly established by statute or otherwise, applicable to a case of this character by which to determine the reasonableness or unreasonableness of the restraint in question. To say that an agreement is illegal if it is unreasonable does not, in the absence of a clearly understood standard, greatly advance the discussion. The presence or absence of competition and the manner in

Opinion of the Court.

which it is or may be affected necessarily enter into the question.

At common law, the reasonableness of the restraint of competition in cases in which such restraint was permitted was measured by the character and extent of the business sold, and by what was fairly required for its protection. *Oakdale Mfg. Co.* v. *Garst*, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784. The facts were determined and compared, both as to the business sold and as to the extent of, and necessity for, the restraint.

"But the greater question is whether this is reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable." Tindal, C. J., *Horner* v. *Graves*, 7 Bingham Reports, 743; Joyce on Monopolies, § 109, collecting cases.

Like principles would seem to be applicable to the case before us. That prices were affected by the alleged agreement seems by itself not enough to render the agreement unreasonable. 23 Harv. Law Rev. 541, citing many cases. The very object of agreements as to price and of most business combinations is to affect prices; if that alone in-[475] validates them, all such agreements and most combinations are either nugatory or unlawful. The only combination permitted would be one which was of advantage to its members simply by reducing the cost of the goods sold; but this seems a shadowy and impractical distinction; it has never, so far as I am aware, been adopted by any court.

"If the object of the contract had been merely to provide in good faith a uniformity of prices among the parties thereto to avoid unhealthy fluctuations in the market, or if the contract had contemplated a joint and mutual association between the parties for the common benefit in the nature of a partnership, and had simply fixed the prices at what they considered the business would bear, instead of combination between independent manufacturers and dealers for the purpose of at least destroying all competition between themselves, then there might have been nothing in such an arrangement which

the courts could denounce as pernicious and forbidden by law." Marr, J., *Texas Standard Cotton Oil Co.* v. *Adoue*, 83 Tex. 650, 657, 19 S. W. 274, 276 (15 L. R. A. 598, 29 Am. St. Rep. 690).

The public has no right to unrestricted competition among all the persons engaged in any given business, nor to the benefit of prices produced by such competition. *Meredith* v. *Zinc & Iron Co.*, 55 N. J. Eq. 211, 221, 37 Atl. 539, per Pitney, V. C.; Joyce, Monopolies, § 101. The manner in which the restriction is effected—assuming no illegal intent to have existed—is not material, whether by a combination, by the appointment of a joint agent, or, as in this case, by mere agreement. Courts have not hesitated to disregard the form under which a restraint was effected if an illegal purpose or result was shown. By parity of reasoning, if the purpose or result are lawful, it is immaterial in what manner they are accomplished. Joyce on Monopolies, § 106. Each case is to be decided on its own facts. Joyce on Monopolies, § 102. What restriction of competition is permissible will differ widely according to the business situation in which the contracting parties find themselves. An agreement between persons engaged in quasi public employments, monopolistic in character, might be held unreasonable on much slighter grounds than an agreement between persons having no public franchises and no natural monopoly, and against whom ordinary competition might be expected to be effective.

In order to make a restraint unreasonable, it must, it seems to me, appear either (1) that the normal volume of interstate trade has been interfered with by artificial agencies affecting to a substantial degree, to the disadvantage of the public, the prices or supply of the product, commodity, or business which is the subject of the alleged restraint, and going beyond what is fairly required for the proper protection of the parties accused; or (2) that by means of a combination or agreement between the parties concerned, either by themselves alone or in connection with others, the price or supply of the product, commodity, or business, which is alleged to be the subject of undue restraint, is or may be affected to a substantial extent to the disadvantage of producers or purchasers, so as thereby to operate in a material degree to the injury of the public, and beyond what can fairly be said to constitute a proper protection for the parties

to the alleged combination or agreement; or (3) that there has been direct and intentional interference with the transportation of commodities between the States.

[476] Considering, on the one hand, the situation of the parties to the agreement, the possibilities of loss to them which unrestricted competition involved, and their right to protect themselves fairly against it, and, on the other hand, the public needs and the advantages to the public from unrestricted competition, it must appear that the defendants have done more than was fairly justified by reasonable self-protection, and have thereby obtained an unfair advantage in the trade in question. In the absence of unlawful intent and actual oppression a restraint of competition would hardly be deemed unreasonable, unless so wide and far-reaching as substantially to alter the general conditions under which persons engaged in that trade in that district did business. A limited market and one nicely balanced as between buyers and sellers might be greatly distributed by an agreement between only a few buyers or sellers, while a broader market might not be unfairly affected by a combination involving many persons and large amounts of goods.

"The application of the rule does not depend upon the number of those who may be implicated, or the extent of space included, in the combination, but upon the existence of injury to the public. One combination, consisting" in a number "of those engaged in a given branch of trade, may amount to a practical monopoly, while another, less extensive in scope, may, as well, bring disaster in its train." Starrett, C. J., *Nester* v. *Continental Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894.

What has been said so far applies to cases in which there was no unlawful intent, i. e., no intent to do more than protect the business of the contracting parties.

"Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important." Lurton, J., *U. S.* v. *Reading Co. et al., supra.*

The intent charged in the indictment is:

"To wrong the public and to oppress and limit the rights of milk producers in the States aforesaid by depriving said producers of the higher price for milk which would have resulted from free and open competition among said defendants, all as aforesaid."

Opinion of the Court.

While I do not think it necessary to decide whether this allegation of intent adds anything to the indictment, it seems to me at least doubtful whether it does so. If the defendants had a right to agree to refrain from competition in price, their intent to deprive the public of the advantages of competition inter se would not be an unlawful one. It is perhaps true that an agreement which might be valid if made by the defendants for their own advantage would be illegal if made for the purpose of oppressing the public; in other words, if it was a purely malicious, and not a selfish, affair—but the combination alleged is plainly not of that character. The great doubt about the case is whether any combination can be found to be an unreasonable restraint of trade in the absence of coercive methods, of monopolistic control over some commodity or service, and of intent to exclude others from the industry in question—matters which have been to some extent relied on by the Supreme Court in decisions under this statute. *Standard Oil case*, 221 U. S. 1, 75, 76, 77, 31 Sup. Ct. 502, 55 L. Ed. [477] 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *U. S.* v. *St. Louis Terminal Co.*, 224 U. S. 383, 395, 32 Sup. Ct. 507, 56 L. Ed. 810; *U. S.* v. *Winslow*, 227 U. S. 202, 217, 33 Sup. Ct. 253, 57 L. Ed. 481. It seems to me, however, that the elements referred to, while usually present in such cases, are not essential.

Applying these views of the law to the case at bar: Here is a well-defined and extensive industry consisting on the one side of producing milk and selling it, and on the other side of buying it and shipping it to Boston and vicinity and Worcester. Eighty-six per cent of the buying side of this industry was in the hands of these defendants. For them to agree upon prices which they would pay, and thereby to eliminate practically all competition as to price among buyers, may be found to have so serious affected the conditions under which all persons engaged in that industry did business as to be an unreasonable restraint of trade. It is true that the milk produced might have been sold through other channels; but it is also true, as a matter of common knowledge, that it takes time to divert business from one channel

into another. The sellers ought not to be compelled either to find other outlets for their product, or to await the re-establishment of competition among buyers, being obliged meanwhile to sell their output at prices affected, if not established, by the combination of buyers, and in the making of which competition had been practically eliminated.

On the day after this agreement went into effect, what was the producer of milk to do with his product? His choice was either to take the uncompetitive price obtainable, or, with a perishable product, to start in to hunt up other markets for it. He ought not to be put into that position. He was not entitled to a continuance of all the competition that had existed the day before in the channel through which he was accustomed to dispose of his goods; but, as one of the public, he was entitled not to have all effective competition as to prices in that channel suddenly suppressed by agreement between 86 per cent of the buyers therein. The fact that the alleged agreement does not appear to have been used oppressively is not sufficient to save it. In cases of restraint of trade or monopoly not arising under the Sherman Act, the prevailing view (although there has been some difference of opinion on this point) is that the potential evils of a monopoly or dominating control in any trade are sufficient to invalidate agreements having that purpose or result without proof of actual injury or evil result. *People* v. *Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690. The reasoning of these cases seems applicable to present conditions; and where the purpose or result of an agreement is to give the parties thereto a monopoly of any commodity, or a dominating control in any trade, the agreement would seem, prima facie at least, to be unreasonably extensive and therefore illegal.

It may be that the trade in milk for the Boston and Worcester markets was so closely interwoven with the general business of producing and selling milk that the agreement alleged may, upon a trial of this indictment, be found not to have substantially and unfairly limited the rights of the producers, because they still had other sufficient markets for their product which were not affected by the combi-

nation between [478] these defendants, nor to have conferred upon the parties to it any real domination or control of prices, and to have been only a fair limitation as between themselves of what would otherwise have been destructive competition. But there are limits to the right of collective bargaining, and, upon the facts stated in the indictment, it seems to me that the alleged combination might be found to have been unreasonably extensive and an unreasonable restraint of trade.

[6, 7] As to the second count of this indictment:

This count charges, as has been said, an attempt to monopolize trade. In all such cases which have heretofore come before the courts under the Sherman Act, there was on the part of the defendants ownership or control of the commodity. Upon such facts, there was no necessity for a sharp distinction between a combination in restraint of trade and a monopoly. No case has been found under that act in which a charge of attempted monopoly was based on an agreement among buyers only, without regard to the market in which they resold. As has been pointed out, there is no allegation, express or implied, in this indictment that these defendants dominated or controlled the markets in which they sold their milk. A "monopoly," both at common law and under this statute, implies, I think, the control of goods or service which the public desires to obtain. An attempt to monopolize means an attempt to get control of the industry in which the defendant is engaged "by means which prevent other men from engaging in fair competition with him." *Re Greene* (C. C.) 52 Fed. 116; Joyce on Monopolies, §§ 65–69. There may be, I think, an unreasonable restraint of trade which does not constitute a monopoly; though there can be no monopoly which does not constitute an unreasonable restraint of trade.

The business of these defendants was buying milk from the producers and selling it again to the public. The only way in which the combination alleged could in any way tend to enlarge their control of that business was by forcing down the price at which they bought, so that they would be able to undersell their competitors in the selling market. No

facts are alleged from which any such purpose or intent can be inferred. It is not apparent how the alleged agreement as to buying prices would tend in any way to enlarge the defendants' control of their buying market or to exclude competitors therefrom. Its natural effect would seem to be just the reverse. The indictment alleges that the agreement was made "with the intent to wrong the public and to oppress and limit the rights of milk producers * * * by depriving said producers of the higher prices for milk which would have resulted from free and open competition among said defendants." There can be no monopoly unless there is something which is monopolized. These defendants combined no tangible property, nor any control of tangible property. What they had was the ability and willingness to buy milk. It is not unlike a combination not to bid, or to bid only an excessive price, for public work, which has been held illegal, but which is certainly not a monopoly. *Gibbs* v. *Smith*, 115 Mass. 592 (but compare *Marshalltown Stone Co.* v. *Des Moines Brick Mfg. Co.*, 114 Iowa, 574, 87 N. W. 496). The manifest purpose of the agreement set out was to eliminate competition as to price in buying be[**479**]tween the defendants; and, upon the facts alleged, no other intent or purpose can be discovered.

This count therefore seems to me not to charge a crime.

[8] As to indictment No. 453:

This indictment charges conspiracy in restraint of trade. It does not contain the allegations of indictment No. 454 as to the percentage of milk sold in the country districts for shipment to the Boston and Worcester markets, which was bought by the defendants, nor any allegations from which it can be inferred that the defendants either controlled or were dominating factors in the buying market in the country or selling markets in those cities. For aught that appears, they may have been unimportant factors in each one. This indictment would have been good if no question of reasonableness were open. *U. S.* v. *Addyston Pipe Co., supra.* But under the Sherman Act that question is open, and the indictment must, as above explained, allege facts warranting a finding by the jury that the restraint was un-

reasonable. The facts alleged do not justify such a conclusion, and no crime is therefore charged. Everything which this indictment sets out may be true, and still the combination or conspiracy may not have extended beyond what was reasonable, nor have unduly affected the conditions under which other persons engaged in that industry, either buying or selling, did business.

In *State* v. *Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817, 17 Ann. Cas. 96, the indictment charged, in substance, that the five defendants did—

"combine, confederate, and conspire together by divers unlawful and fraudulent devices, contrivances, and acts, unlawfully to regulate the price at which coal should be sold in the said city of Providence, * * * which said coal was then and there an article of prime necessity to the public and the consumers thereof."

The defendants demurred, and the court sustained the demurrer, holding that monopoly was the gist of the common-law offense, and that, as it did not appear from the indictment that the defendants had any power of control over the coal trade, they could not create a monopoly. The case raised the question whether every agreement to regulate the price of a prime necessary of life was criminal at common law; and the court, in sustaining the demurrer, decided that this was not so. The decision implies that under some circumstances such agreements may lawfully be made.

At the arguments on these demurrers it was said that the trial of the cases before a jury would take not less than six weeks and might take double that time. It is deplorable that the Government and the defendants should be compelled to go to the trouble and expense which such a trial involves upon the opinion of a single judge on a doubtful question of law. But there is no way under the Federal practice by which the lower court can present such questions as are raised by these demurrers to the first count of indictment No. 454 to an appellate court until after verdict and judgment. The case shows the need of legislation giving the District Courts of the United States the right, now possessed by trial courts in many of the States, to report

important and [480] doubtful questions of law to the appellate court for determination before trial upon the facts.

The result is:

That indictment No. 453 is adjudged insufficient in law, the demurrers thereto are severally sustained, and the defendants go therefrom without day.

That indictment No. 454 is adjudged sufficient in law as to the first count thereof, that the demurrers to said count are severally overruled, and that the defendants are given leave to plead to said count on or before April 1, 1914.

That indictment No. 454 is adjudged insufficient in law as to the second count thereof, that the demurrers to this count are severally sustained, and that the defendants go therefrom without day.

WOGAN BROS., INC., *v.* AMERICAN SUGAR REFINING CO.

(District Court, E. D. Louisiana. July 1, 1914.)

[215 Fed. Rep., 273.]

COURTS (§ 270)—UNITED STATES COURTS—DISTRICT IN WHICH SUIT IS BROUGHT.—Sherman Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), providing that any person injured by reason of any violation thereof, may sue in any Circuit Court in the district in which the defendant resides or is found, was not repealed by the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 128]), which in section 289 abolishes the Circuit Courts, in section 24, par. 23, gives District Courts jurisdiction of all suits under any law to protect trade against restraints and monopolies, in section 291 provides that when, under any law not embraced within that act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall be deemed to refer to and confer such power and impose such duty upon the District Courts, and in section 297 provides that all acts in so far as they are embraced within or superseded by that act are thereby repealed, since the only radical change made by the Judicial Code was the abolition of the Circuit Courts, the purpose in other respects being to codify the existing law; and hence Judicial

Opinion of the Court.

Code, § 51, requiring certain actions to be brought in the district of defendant's residence, does not apply to suits for violations of the Sherman Act.[a]

[Ed. Note.—For other cases, see Courts, Cent. Dig., § 810; Dec. Dig., § 270.]

Action by Wogan Bros., Incorporated, against the American Sugar Refining Company. On exception to the jurisdiction of the court. Exception overruled.

F. Rivers Richardson and *Caffrey, Quintero & Brumby*, all of New Orleans, La., for complainant.

Carroll, Henderson & Carroll and *Denegre, Leovy & Chaffe*, all of New Orleans, La. (*James M. Beck*, of New York City, of counsel), for defendant.

FOSTER, District Judge.

This is a suit for triple damages under the act of July 2, 1890, known as the Sherman Law. The plaintiffs are citizens of Louisiana, and the defendant is a corporation organized under the laws of New Jersey, but doing business in Louisiana and found within this district.

[274] Defendant excepts to the jurisdiction of the court, on the ground that the action is between citizens of different States, and is also based on an act of Congress; and hence, by virtue of section 51 of the Judicial Code, defendant can only be sued in the district of its domicile. The exception is, of course, good, unless the court has jurisdiction of the case by virtue of section 7 of the Sherman Act, which provides that any person injured may sue therefor in any Circuit Court of the United States in the district in which the defendant is found.

The defendant contends that Congress in enacting the Judicial Code and abolishing the Circuit Courts by section 289, and vesting the District Courts with jurisdiction generally over suits arising under any law to protect trade and commerce against restraints and monopolies, by paragraph 23 of section 24, has placed all suits brought under the Sherman

[a] Syllabus copyrighted, 1914, by West Publishing Company.

Act on the same footing with other suits, where both diversity of citizenship and a Federal question are grounds of jurisdiction.

Defendant also relies upon section 291 of the Judicial Code and the last paragraph of section 297 as evidencing the intention of Congress to repeal the provisions of the Sherman Law allowing the plaintiff to sue in whatever district the defendant might be found.

Construing all of these sections together, I cannot agree with defendant's contention. The only radical change made by the Judicial Code was the abolition of the Circuit Courts. In all other respects it was the intention of Congress to codify existing law for the purpose of compiling it in more convenient form and logical sequence. Necessarily, in giving the District Court all the jurisdiction formerly possessed by the Circuit Court, new and appropriate legislation had to be enacted; but there can be no presumption that it was intended to deprive litigants under special acts of any rights they then possessed.

Clearly section 297 can have no application to the Sherman Act. There is no express repeal, and no part of it is either embraced within or superseded by, the code. And section 291 is entirely destructive of the defendant's theory. Section 291 of the Judicial Code provides as follows:

"Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the District Courts."

Power is synonymous with jurisdiction. Section 291 is plain and unambiguous and transfers to the District Courts all the jurisdiction and power that the Circuit Courts had with regard to the enforcement of the Sherman Law.

Entertaining these views, it is unnecessary to pass upon the question of estoppel raised by the plaintiffs.

The exception will be overruled.

Syllabus.

DE KOVEN ET AL. v. LAKE SHORE & M. S. RY. CO. ET AL.

(District Court, S. D. New York. September 5, 1914.)

[216 Fed. Rep., 955.]

MONOPOLIES (§ 24)—STATE ANTI-TRUST LAWS—SCOPE.—A bill does not state a cause of action for an injunction to restrain the consolidation of two railroad companies as being in violation of the anti-trust laws of certain States, where it alleges no facts showing any restraint upon transportation exclusively in any one of such States.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MONOPOLIES (§ 24)—CONSOLIDATION OF CORPORATIONS—INJUNCTION—STOCKHOLDERS' SUIT—EQUITY JURISDICTION.—A suit by minority stockholders of a railroad company to restrain the majority stockholders from effecting a consolidation with another company on the ground that it will be illegal as in violation of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is not one brought under the provisions of such act, but one invoking a remedy which existed before its passage, and is within the general equity jurisdiction of a Federal court.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MONOPOLIES (§ 24)—CONSOLIDATION OF CORPORATIONS—STOCKHOLDERS' SUIT—ENJOINING CONSOLIDATION.—Minority stockholders of a railroad company *held* not entitled to a preliminary injunction to restrain its consolidation with another company on the alleged ground that it would be illegal as in restraint of competition and in violation of the Anti-Trust Act, where, through ownership of a majority of the stock of one company by the other, they were and had been for a number of years, as completely under one management and control as though consolidated, and during all such time the United States had acquiesced therein.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

INJUNCTION (§ 135)—PRELIMINARY INJUNCTION—DISCRETION OF COURT.—The granting of a preliminary injunction is discretionary with the court, the discretion to be exercised according to the circumstances of each case and the comparative injury that may result to the interested parties from its granting or denial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.]

Opinion of the Court.

RAILROADS (§ 123)—STOCKHOLDERS' SUIT TO RESTRAIN CONSOLIDATION—PRELIMINARY INJUNCTION.—The plan of consolidation of two railroad companies proposed by one, which owned a majority of the stock of the other, *held* on its face and on the showing made not so clearly unfair or inequitable to the minority stockholders of the latter as to justify the granting of a preliminary injunction restraining the consolidation, their objection being only to the amount of stock to be allotted to them in the consolidated company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 389; Dec. Dig. § 123.]

In Equity. Suit by Annie L. De Koven and Cecil Barnes, as trustees, etc., against the Lake Shore & Michigan Southern Railway Company and the New York Central & Hudson River Railroad Company. On application for preliminary injunction. Denied.

[956] *Cadwalader, Wickersham & Taft*, of New York City (*George W. Wickersham*, of New York City, *Otto Kirchner*, of Detroit, Mich., *H. M. Daugherty*, of Columbus, Ohio, and *Edwin P. Grosvenor*, of New York City, of counsel), for plaintiffs.

Charles C. Paulding, of New York City (*Walter C. Noyes*, of New York City, *Alexis C. Angell*, of Detroit, Mich., and *Albert H. Harris*, of New York City, of counsel), for defendant Lake Shore & Michigan Southern Ry. Co.

Alexander S. Lyman, of New York City (*Walter C. Noyes*, of New York City, *Alexis C. Angell*, of Detroit, Mich., and *Albert H. Harris*, of New York City, of counsel), for defendant New York Cent. & H. R. R. Co.

GRUBB, district judge.

This is an application by the plaintiffs for a preliminary injunction, restraining the defendant from completing a projected consolidation of the two railroad companies who are the defendants in the bill of complaint. The bill is filed by one of the minority stockholders of the defendant the Lake Shore & Michigan Southern Railway Company, owning 500 shares of its capital stock, on behalf of the

plaintiffs and all other of its stockholders, who may after its filing desire to unite with plaintiffs therein.

The proposed consolidation is attacked by the plaintiffs and its completion asked to be restrained upon three separate grounds: (1) Because it is alleged that the proposed consolidation will be in violation of the anti-trust laws of the States of Michigan, Ohio, and Pennsylvania. (2) Because it is alleged that the proposed consolidation will be in violation of the act of Congress, approved July 2, 1890, known as the Sherman Anti-Trust Law. (3) Because it is alleged that the terms of the proposed consolidation are unfair and inequitable to the minority and dissenting stockholders of the defendant the Lake Shore & Michigan Southern Railway Company.

[1] First. While the bill alleges that the proposed consolidation will violate the anti-trust laws of the States of Ohio, Michigan, and Pennsylvania, it avers no facts showing a restraint of anything but interstate commerce, between the city of Buffalo, in the State of New York, and the city of Chicago, in the State of Illinois. The restraint or monopoly of interstate transportation is provided for by the Sherman Anti-Trust Law, and it displaces the jurisdiction of the States to regulate or prohibit with regard to that subject matter. There is no averment of any restraint upon any transportation exclusively within any one of the States mentioned, to which the anti-trust laws of any one of those States might apply, even if it be conceded that the regulation or prohibition of such restraints or monopolies would still be held to be within the competency of the States, in view of the existing legislation of Congress upon the subject of restraints and monopolies in transportation.

Second. It is alleged that the proposed consolidation will be in violation of the Sherman Anti-Trust Law. The lines to be consolidated are neither competing nor parallel lines. The defendant, the New York Central & Hudson River Railroad Company, however, is the owner [852] of a controlling interest in the capital stock of the Michigan Central Railroad Company, which, by virtue of its controlling stock ... the Canada Southern Railway Company, forms

a line from Buffalo to Chicago, which, separately owned, would compete with the line from Buffalo to Chicago, which will be formed by the consolidation of the two defendants. It also appears that the defendant, the New York Central & Hudson River Railroad Company, is the owner of the capital stock of the Western Transit Company, which owns a line of steamships operating between Buffalo and Chicago, and which would, separately owned, compete with the consolidated line. The defendant, the Lake Shore & Michigan Southern Railway Company, also owns the New York, Chicago & St. Louis Railroad Company, which is a practically parallel line to it from Buffalo to Chicago. It is by virtue of this situation that the plaintiffs contend that the proposed consolidation will continue and perpetuate the existing control of all four lines in the consolidated company, and so operate in violation of the Sherman Law.

The defendants' reply to this contention that: (*a*) It is the well-settled rule in the second circuit that a suit in equity under the Sherman Law will only lie at the instance of the United States; (*b*) that the bill and affidavits fail to show any restraint or monopoly of interstate transportation arising out of the proposed consolidation; (*c*) that the control, which is alleged to be in violation of the law, already existed for many years before the plan of consolidation was considered, and would not be intensified by the completion of the plan; and (*d*) that the former control is changed by the plan of consolidation in form only, and not substantially in degree, and that the United States has for years acquiesced in that control, through failure of the Department of Justice to act, and affirmatively through the approval of the Interstate Commerce Commission.

[2] (*a*) The plaintiffs contend that the bill is not a suit in equity under the Sherman Act, and that the decisions from the second circuit, relied upon by the defendants, do not therefore apply. It seems to me that the plaintiffs' contention is correct. The present suit is one by a dissenting minority stockholder to restrain the majority stockholders from accomplishing what is asserted to be an illegal or ultra vires act. It is, therefore, a well-recognized species of general

Opinion of the Court.

equity jurisdiction, and not a mere statutory remedy, conferred by the Anti-Trust Law. The plaintiffs would be entitled to resort to this remedy if the Sherman Law had provided no equitable remedy for its enforcement, and the fact that it did provide one, available only to the United States, cannot be held to deprive an individual of an equitable remedy which was open to him before and independent of the statute. The fact that the relief granted to the Government in an equity suit, instituted by it under the Sherman Law, might be of the same nature as that granted an individual plaintiff cannot change the result. Nor can the fact that the illegal or ultra vires act is made so only by the statute which creates the equitable statutory remedy, do so. If it be an illegal or ultra vires act, however made so, a minority stockholder had, under the general principles of equity juris[958]prudence, a remedy to restrain the corporation and the majority stockholders from accomplishing it, of which he is not deprived by the creation of a statutory equitable remedy in favor of the Government alone, and of which he is not permitted to avail. It seems clear that if the Sherman Law had declared combinations in restraint of trade illegal and ultra vires, and provided no equitable remedy in favor of the Government or any one else, the interest of a minority stockholder that his shares should not be involuntarily transferred from a lawful to an unlawful enterprise would entitle him to complain of the proposed action of the corporation, through the majority stockholders, in a suit in equity. The providing of such a statutory remedy, which could be availed of only by the Government, ought not to be construed to take away by implication the existing remedy of the individual stockholder under general equity principles. A dissenting stockholder would have a standing in equity to enjoin a proposed consolidation of competing parallel lines, in violation of a State constitutional provision prohibiting such consolidations, upon the ground that it was ultra vires. I can see no distinction between the effect of such a constitutional provision and that of the Sherman Law in this respect.

(*b*) The averments of the bill are sufficient to put in issue, as a matter of pleading, the illegality of the proposed consolidation under the Sherman Act, and the affidavits of plaintiffs to the bill and of Mr. Rowland are some evidence tending to support the allegations of the bill. The affidavits of Messrs. Smith and Kallman qualify or deny the facts contained in those of the plaintiffs. The issue is presented for decision upon an application for a preliminary injunction. It is clear that so important and complicated an issue cannot be satisfactorily determined, except upon final hearing, and would be best determined in a suit in which the Government was the complaining party, since a decision in this case would not be binding upon the United States, but, on the contrary, a decision in a suit instituted by the United States would be controlling as to all parties.

[3] (*c*) The defendants assert that the consolidation would affect the form, but not the fact of control, which would remain after consolidation just as it did before, and with no greater force or effect. This seems to have been the view taken by the Interstate Commerce Commission as justifying its report in favor of the consolidation. It is quite clear that the New York Central Company, through its stock ownership in the Lake Shore Company and the identity of managements, has since 1898 exercised as complete a control over the latter as it could have done by a legal consolidation. The proposed consolidation can, at most, only make easier the perpetuation of that control. It cannot add anything to the control, since it was complete already. If the control is hereafter determined to be illegal, it does not follow that the proposed consolidation of the two defendants would be found obnoxious to the statute. Before consolidation the New York Central, if the combination was found to be illegal, would have been compelled to part either with its interest in the Michigan Central Company and in the Western Transit Company, or both, or with its interest in the Lake Shore Company, and the Lake Shore with its **[959]** interest in the New York, Chicago & St. Louis Company. The same alternative would be presented to the consolidated company after the consolidation, in the event the consolidation should

Opinion of the Court.

be successfully assailed. Confronted with the necessity so created, the consolidated company might well elect to part with its interest in the Michigan Central and in the steamship company and retain its interest in the Lake Shore. If it did so, a consolidation, such as is proposed between the defendants, would be beyond criticism. Its proposal to consolidate the two defendants without including the Michigan Central and the steamship company would indicate such an election on the part of the New York Central Company in advance of a requirement to exercise it. If the stock ownership of the New York, Chicago & St. Louis Company by the Lake Shore Company is in violation of the law, it is because the two lines are parallel and competing, and this is as true before as after the proposed consolidation. The status would therefore in no way be affected by the proposed consolidation. The illegality of the plaintiffs' ownership of stock in that company would exist before and after consolidation in exactly the same degree. It is true that a future forced separation of the Michigan Central Company or the steamship company, or both, from the consolidated company might lessen the value of the consolidated company's stock, as compared with the Lake Shore Company's stock, and so make necessary, to accomplish equity to the Lake Shore Company's minority stockholders, a more favorable ratio than is now proposed to be accorded them in the consolidation. The necessity for such a separation and the probable terms of disposition of the interest of the consolidated company in the Michigan Central Company and the steamship company, in the event thereof, are too conjectural, so far as causing injury to the minority stockholders of the Lake Shore Company is concerned, to justify the interposition of the court to stay the consolidation, at least at this stage of the proceeding. The enforced separation of the Western Transit Company depends upon the decision of the Interstate Commerce Commission under the Panama Canal Act, and the probable result of the exercise of its discretion is entirely conjectural.

(*d*) The acquiescence of the United States in the control hitherto exercised by the New York Central Company in the Lake Shore Company, the Michigan Central Company,

and the steamship line, and of the Lake Shore Company in the New York, Chicago & St. Louis Company, would probably not prevent the Government from hereafter seeking a dissolution of the combination, if it be a combination in restraint of interstate transportation, in violation of the Sherman Law. *United States* v. *International Harvester Co.* (D. C.) (Eighth Circuit, decided August 12, 1914) 214 Fed. 987.

[4] The granting of a preliminary injunction is discretionary with the court; the discretion to be exercised according to the circumstances of each case and the comparative injury that may result to the interested parties from its granting or denial. In view of the long period of acquiescence on the part of the United States in the identical control exercised by the New York Central Company; in view of the unsatisfactory opportunity of determining the issue on a preliminary **[960]** motion, and the very great advantage of having the legality or illegality of this control determined once for all, which can only be done at the suit of the United States; in view of the fact that the illegal control, if it be illegal, existed before as well as after consolidation, and, so far as the ownership of the New York, Chicago & St. Louis Company is concerned, with the acquiescence of the plaintiffs and the other minority stockholders of the Lake Shore Company, and in view of the fact that the illegality in the combination, if any exists, can be removed without disturbing the consolidation of the two defendants, and upon terms fraught with only conjectural injury to the plaintiffs, it seems to me that the discretion of the court would be properly exercised by denying the motion for an injunction pending final hearing, leaving the plaintiffs to seek redress in the interim, if entitled to any on this line, through the United States in a suit brought by it, or upon final hearing in this cause. If the United States should take action pending final hearing, it would be time enough for the plaintiffs to apply to stay the consolidation pending the result of such action. If the consolidation should be completed pending final hearing, in the absence of governmental action, and the control of the consolidated company be held thereafter illegal, it

would not follow that the consolidation would be set aside, since the illegality could be corrected by the separation of the companies subject tc such control, other than those consolidated.

[5] Third. The plaintiffs also attack the proposed consolidation upon the further ground that the basis of exchange of the Lake Shore shares for those of the consolidated company is unfair and inequitable to the minority stockholders of the Lake Shore Company. The plan of consolidation can be carried out only by the New York Central Company voting its shares in the Lake Shore Company in favor of it. It must therefore affirmatively appear that the plan is fair and just to the minority stockholders, or it cannot be sustained. The New York Central Company, as a majority stockholder in the Lake Shore Company, occupies to its minority stockholders a quasi fiduciary relation, which imposes the obligation of perfect good faith in its dealings towards the minority. If the agreement of consolidation is shown to be fair and equitable to the minority, it should be permitted to be proceeded with, otherwise not.

The agreement of consolidation provides that the minority stockholders of the Lake Shore Company shall receive five shares of the capital stock of the consolidated company for each share of Lake Shore stock owned by them; that the stockholders oi the New York Central Company shall receive one share of stock in the consolidated company for each share of their stock in the original company; that the Lake Shore stock owned by the New York Central Company shall be canceled; and that the consolidated company shall assume the debts of, and its entire property be liable for, the obligations of the constituent companies. The effect of the agreement, as it relates to the minority stockholders of the Lake Shore Company, is to give them a one-tenth interest in the properties of the Lake Shore, which is the proportion of their ownership in that property at present, and in ad[961]dition a one-tenth interest in the properties of the present New York Central Railroad Company. This would be represented by their stock interest in the consolidated company. As they retain the same quantum of interest

in the Lake Shore properties after as before consolidation, it is clear that the agreement of consolidation deals fairly with them, unless it be that the addition of the properties of the present New York Central Railroad Company, subject to its obligations, will make their proportionate interest in the consolidated property of less value than their present like proportionate interest in the present properties of the Lake Shore alone. This would seem to depend upon whether or not it is likely that the present properties of the New York Central Railroad Company, when taken in connection with its present and prospective indebtedness, will prove of advantage to the Lake Shore or be a burden upon it. So long as the net earnings of the present New York Central properties, applicable to the payment of dividends, amount to a substantial sum, it is clear that the consolidation will be an advantage to the Lake Shore minority stockholders, since their dividends upon the consolidated properties, in that event, will exceed those from the Lake Shore properties alone. It is conceivable that the New York Central properties might fail to earn net sufficient to more than pay the fixed charges to which they are subject, or that the burden of its indebtedness assumed by the consolidated company might at some time be such as to depress the value of the interest of the minority stockholders of the Lake Shore in the joint properties below that of their interest in those of the Lake Shore alone. This is the plaintiffs' contention.

An examination of the affidavits presented upon the hearing of the motion convinces me, as far as affidavits can, that there is no reasonable ground to apprehend that the net earnings of the present properties of the New York Central Railroad Company, applicable to the payment of dividends. will reach the vanishing point, so far as it is possible to foresee at the present time, or that these properties are at all likely to become a burden and a disadvantage to the consolidated company. It is true that the proportion of net operating income necessary to take care of interest and rentals, is much higher for the New York Central than for the Lake Shore, and that this fact is to be reckoned with as one of the factors in fixing a fair proportionate value

between them. It is, however, not the sole factor, and it seems to me undue emphasis is given to it by the method used by Mr. Thompson in his affidavit in support of plaintiffs' motion. That some weight has been given to it, upon the basis of the proposed consolidation, is evident from the fact that, based upon the proportionate contribution of each road to the dividend fund according to the average net earnings of each for the last five years, the ratio of value would be less than 3½ to 1, instead of 5 to 1, as in the proposed consolidation. It is possible that, upon a fuller presentation upon final hearing, a different conclusion may be reached. It is difficult to reach a satisfactory conclusion upon the affidavits of experts and in the absence of cross-examination. If the attitude of the plaintiffs was that of resisting consolidation upon any terms, irreparable injury might result from [962] the denial of the preliminary injunction. Their objection is not to the fact of consolidation, but to the proportion of values on which the exchange of stock is to be had according to the proposed agreement. A ratio of 7¾ to 1 would, it appears, not be unsatisfactory to them. Upon final hearing, if plaintiffs sustain their contention that their minority stock should receive a larger proportionate interest in the consolidated company, it will not be too late to correct the mistake, and this can be done without necessarily setting aside the consolidation, if it has then been completed. A court of equity could decree the setting aside of the consolidation conditionally upon the plaintiffs not being accorded the increased share in the consolidated company or its equivalent in money, which the court may find the plaintiffs entitled to, in addition to what they receive under the agreement of consolidation. In that way the interest of the plaintiffs would receive the proper protection, the plan of consolidation would not be unduly delayed pending the final hearing, and any injustice ascertained upon final hearing to have been done the plaintiffs or other dissenting minority stockholders could then be rectified without necessarily upsetting the consolidation. The pendency of the litigation would charge those dealing in the securities affected by the consolidation with notice of the rights of the plain-

tiffs and other minority stockholders and preserve the plaintiffs' rights unimpaired as to such persons.

In view of the fact that the complaint of the plaintiffs relates to the amount of stock in the consolidated company to be allotted to them by the proposed agreement and is not directed against a consolidation upon any terms, and in view of the fact that the consolidation may be allowed to proceed, pending final hearing, and no irreparable injury result to the plaintiffs, whose additional interest in the consolidated company, if any there be, can be provided for in the final decree, or by setting aside the consolidation, in the event it is not provided for, and in view of the probable injury to defendants by delaying the accomplishment of the consolidation until final hearing, an injury not admitting of computation upon a basis that would justify compensation in the way of damages, it seems to me that the motion for a preliminary injunction should be denied upon this ground also, and the rule to show cause discharged, at the costs of the plaintiffs.

UNITED STATES v. KEYSTONE WATCH CASE CO. ET AL.[a]

(District Court, E. D. Pennsylvania. January 2, 1915.)

[218 Fed. Rep., 502.]

MONOPOLIES (§ 12)—ANTI-TRUST ACT—"RESTRAINT OF TRADE" PROHIBITED.—To fall within the prohibition of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821), it is necessary that the "restraint of trade," which it is the purpose of both sections to prevent, should be direct, and not merely incidental, and should also be undue or unreasonable. If it be both direct and undue, no disguise will save it; but the courts will search for the substance and the actual effect of the transaction, and will grant the needful relief.[b]

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[a] The case is pending in the Supreme Court on the appeals of both parties.

Syllabus.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

[508] MONOPOLIES (§ 14—ANTI-TRUST ACT—ACTION CONSTITUTING "RESTRAINT OF TRADE."—The mere fact that a manufacturing corporation has largely increased its business, either by enlarging its plants or purchasing the plants and business of other concerns, if they are acquired openly and by proper methods, does not effect an undue "restraint of trade," within the meaning of Sherman Anti-Trust Act, §§ 1, 2, where the volume of production is not lessened, but increased, prices are not inflated, and the power given by the volume of business is not improperly used to injure either competitors or the public.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.]

MONOPOLIES (§ 17)—ANTI-TRUST ACT—ACTS CONSTITUTING RESTRAINT OF TRADE.—Defendant, the Keystone Watch Case Company, acquired the plants, business, and good will of several manufacturers of filled watch cases and also of two or three manufacturers of watch movements. All of the plants so purchased were continued in operation and their production increased. After it had acquired and was operating such plants, its board of directors adopted and it issued to a large number of the prominent jobbers and wholesale dealers in the United States, a circular in which it stated its intention to thereafter sell its products only to those dealers who voluntarily conformed to its wishes, which were (1) that certain of its cases and watches, which were not patented, should be resold only at such prices as it should fix, and (2) that dealers to whom it sold the same should not deal in any cases except those made by it. It then proceeded to strictly enforce such policy, to which some of the jobbers conformed, while those who refused were cut off from purchasing the Keystone products, which constituted perhaps 50 per cent of those in the market. *Held*, that while, up to that time, there was nothing unlawful in its acts, the adoption and enforcement of such policy operated as a direct and unlawful restraint upon interstate trade, in violation of Sherman Anti-Trust Act, §§ 1, 2.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

MONOPOLIES (§ 17)—ANTI-TRUST ACT—UNLAWFUL RESTRAINT OF TRADE.—Defendant made a watch movement known as the "Howard," which was a high-grade watch, material parts of which were covered by valid patents. Defendant made direct agreements with the jobbers to whom it sold the watch, fixing the price at which they might sell to retailers, and also by a mere notice on

Syllabus.

the boxes in which the watch was sold to retailers attempted to fix the price at which they should sell. *Held*, that the agreement with the jobbers was within its rights under the patent law, but that when it sold to the jobber it had fully exercised its right, and its notice to subsequent purchasers was an unlawful restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

MONOPOLIES (§ 12)—UNLAWFUL RESTRAINT OF TRADE—STANDARD FOR DETERMINING.—Whether a combination or course of action is unlawful, as likely to effect an unreasonable restraint of trade, where those engaged in it have made no declaration of its purpose, must be determined in the light of past experience and observation; but if, at the time the question is submitted for decision, it has already been in effect for a sufficient length of time, the question may better be determined by the effect it has actually produced.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

[504] MONOPOLIES (§ 12)—UNLAWFUL RESTRAINT OF TRADE—STANDARD FOR DETERMINING.—While a large increase in the business of a manufacturer necessarily results in a restraint of the trade of competitors, the business is not for that reason, nor because of its size alone, to be condemned as unlawful; but it is unlawful, as an unreasonable restraint, if the growth has been accomplished by fraudulent, unfair, or oppressive methods against competitors, by arbitrarily fixing or maintaining prices, by limiting production or otherwise, by deteriorating the quality of the article produced for the same price, or by arbitrarily reducing the wages of workmen or the price of raw material.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 12)—ANTI-TRUST ACT—RESTRAINT OF "TRADE."—The prohibition against restraint of "trade," embodied in Sherman Anti-Trust Act, §§ 1, 2, is directed to the business of buying or selling for gain, whenever the transaction forms a part of commerce among the States or with foreign countries.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, First and Second Series, Trade.]

MONOPOLIES (§ 12)—ANTI-TRUST ACT—RESTRAINT OF TRADE—"RESTRAINED."—Trade may be "restrained," within the meaning of Sherman Anti-Trust Act, §§ 1, 2, by being hindered, obstructed, or destroyed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

MONOPOLIES (§ 12)—DEFINITION—ANTI-TRUST ACT.—The usual meaning of "monopoly" is the acquisition of something for one's self, and while the word is used most appropriately when the whole of a given trade is acquired, the terms of Sherman Anti-Trust Act, § 2, make it applicable to monopolization of a part of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, First and Second Series, Monopoly.]

In Equity. Suit by the United States against the Keystone Watch Case Company and others. Decree for the United States.

Thomas Watt Gregory, Atty. Gen., and *Thurlow M. Gordon* and *Wm. T. Chantland*, Sp. Asst. Attys. Gen., all of Washington, D. C., for the United States.

Peter B. Olney, *George Carlton Comstock*, and *Harold T. Edwards*, all of New York City, and *Hyneman & Bartlett* and *John G. Johnson*, all of Philadelphia, Pa., for defendants.

Before BUFFINGTON, HUNT, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge.

In December, 1911, the United States filed a petition, or bill in equity, against the Keystone Watch Case Company of Pennsylvania and seven individuals, officers and [505] directors of the company, charging them with violating the Anti-Trust Act of 1890. The generic charge is that the defendants—

"* * * have heretofore made—and the business of said corporation defendant is conducted under and in pursuance of—certain contracts, combinations, and conspiracies, in restraint of the trade and commerce among the States and with foreign countries in filled watch cases and in a watch known as the Howard watch, and are attempting to monopolize the said trade and commerce in filled watch cases and said watch, and have monopolized a part thereof."

The bill then goes on to state:

"The watch industry in the United States is divided into two parts, to wit, the watch case industry and the watch movement industry. Of all watch cases manufactured and sold, more than 90 per cent are filled watch cases; that is, cases made of a base metal surfaced with gold of a varying quantity and degree of purity, the number of solid gold and silver cases being comparatively so small as to constitute a negligible quantity in the market. Hereinafter, when watch case industry or trade is mentioned, it is the filled watch case industry or trade to which reference is had.

"Originally there were engaged in the manufacture of filled watch cases in the United States, and in the interstate and foreign trade and commerce therein, a number of separate and independent firms and corporations, no one of which possessed such a per cent of the industry and trade as to enable it to exercise a dominating influence over the same, and each of whom was engaged in competition with all the others. This condition of the industry and trade continued until about the year 1899."

Taking up the situation at this point, the Government makes certain specific averments, of which one group relates to the period from 1899 to 1903; another, to the period from 1903 to 1910; and a third, to the period from 1910 to the time of filing the bill. In our view of the case, a division into 2 periods will be sufficient—the first, before 1903; and the second, from the beginning of that year onward. But, before turning to the facts, we may state briefly the rules that have been laid down by the Supreme Court to govern controversies under the act of 1890.

The first and second sections of the act are as follows:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Opinion of the Court.

The scope of these sections has been determined by the Supreme Court in the *Standard Oil case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. It will be sufficient to quote the following passage from the opinion:

[506] "As to the first section, the words to be interpreted are:

"'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, * * * is hereby declared to be illegal.'

"As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is: What was the rule which it adopted?

"In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

"(*a*) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

"(b) That, in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination, by which an undue restraint of interstate or foreign commerce was brought about, could save such restraint from condemnation. The statute under this view evidenced the intent, not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

"(*c*) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts—those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce—and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus,

Opinion of the Court.

not specifying, but indubitably contemplating and requiring, a standard, it follows that it was intended that the standard of reason, which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

"And a consideration of the text of the second section serves to establish that it was intended to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace '* * * every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations. * * *'

"By reference to the terms of section 8 it is certain that the word 'persons' clearly implies a corporation as well as an individual.

"The commerce referred to by the words 'any part,' construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States, and any one of the classes of things forming a part of interstate or foreign commerce.

"Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by 'monopolize.' But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred, and the indication which [507] it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly—that is, an undue restraint of the course of trade—all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade—that is, unduly restraining it by means of every contract, combination, etc.—the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section; that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about, or are brought about, be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criterion to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason, guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were

Opinion of the Court.

obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented, if no extraneous or sovereign power imposed it, and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract."

[1] To fall within the prohibitions of the statute it is necessary that the unlawful restraint of trade—and this is not always the same thing as the mere restraint of competition—should be direct, and not merely incidental, and should also be undue or unreasonable. If it be both direct and undue, no disguise will save it; courts will search for the substance and the actual effect of the transaction, and, if trade be unlawfully restrained thereby, will grant the needful relief. There are many methods by which trade may be unduly restrained, and among these are contracts or combinations to fix and maintain prices, or to boycott the goods of a manufacturer or other dealer. We confine our attention to these two violations of the act, because the present controversy turns essentially upon the facts relating to these subjects. And we need not discuss the law further, since there is no dispute concerning the accuracy of the foregoing statements, but may turn at once to the relevant facts.

As might be expected in a record so voluminous, the evidence, whether oral or in writing, is not always either relevant or competent; but we shall not discuss it in detail, contenting ourselves with finding such of the ultimate facts as seem to be necessary. They are as follows:

The present Keystone Company is the second of that name, both of them being Pennsylvania corporations. The first was organized in 1886, and was the successor of several Philadelphia manufacturers, beginning with James Boss,

the inventor of the filled or rolled-plate case, and comprising also John Stukert, Hagstoz & Thorpe, and C. [508] N. Thorpe & Co. These firms and their corporate successor manufactured superior cases and acquired an excellent reputation in the trade. Owing to the death of certain persons that had been interested in the business, and to the consequent need of providing for the demands of their estates, some new financial arrangements seemed to be desirable. At the same time an association known as the T. Zurbrugg Company was manufacturing an inferior grade of watch cases at Riverside, N. J., and some of the persons interested in that association had certain financial connections with the two estates just referred to. (A year or two before, the Zurbrugg Company had bought a small business, owned by J. Muhr & Bro., of Philadelphia, and had combined it with their own.) It was believed by the old Keystone Company and by the Zurbrugg Company that a union of the two enterprises would be mutually advantageous, so that both grades of cases might be made under one management. Accordingly, a new company—the present defendant—was incorporated, and this company bought outright the title to the plant, business, and good will of the old corporation and of the Zurbrugg Company. The persons interested in these two enterprises received either cash or stock in the new company at their option. This transaction took place in July, 1899.

In the following August the Philadelphia Watch Case Company was organized for the purpose of selling the product of the Riverside plant. All of its capital stock was owned by the Keystone Company. As already stated, this product was inferior in grade, and a separate sale thereof seemed advisable, in order to avoid confusing the cases made in the two plants respectively.

Early in 1900 the capital stock of the New York Standard Watch Company, a New Jersey corporation with a plant at Jersey City, was in the market. This company did not manufacture cases, its only product being inexpensive movements. The Keystone Company purchased for cash the capital stock of the Standard Company, the object being

to supply the demand for cheap completed watches. The Keystone Company had found some difficulty in selling its cheaper watch cases, because of the lack of cheap movements to go with them, the movements manufactured by the principal movement companies being relatively too expensive. The separate corporate organization of the Standard Company was continued, and the size and the product of the plant were increased.

Early in January, 1901, the Philadelphia firm of Bates & Bacon, a small manufacturer of cases, sold all its property to the Keystone Company, the machinery at cost and the finished product at selling prices.

In the same month, a small movement business at Waltham, Mass., owned by the United States Watch Company, offered to sell out to the Keystone Company, and in June, or thereabouts, the sale was made. The object of the purchaser was to manufacture medium-priced movements at Waltham, and for this purpose additional capital was furnished, and the plant and facilities were enlarged. A New Jersey corporation by the same name—United States Watch Company—with an authorized capital of $1,000,000 was organized, and operated the Walt[509]ham plant for about two years, manufacturing medium-priced movements only. The business, however, was not successful.

In January, 1903, the watch movement business of the E. Howard Clock Company was offered for sale by a receiver. This company had formerly manufactured an excellent and favorably known movement, but for several years the business had been discontinued. Seeing an opportunity to use the reputation of the Howard movement to aid the United States Watch Company's business at Waltham, the Keystone Company bought the good will, machinery and trade-marks of the Clock Company, so far as they related to watches and watch movements, and moved everything to Waltham. The United States Watch Company was thereupon abandoned, and a new company was organized under the laws of New Jersey, called the E. Howard Watch Company—all of its stock being owned by the Keystone Company—and the Howard Company took over the United States Company's plant, and has since been manufacturing

fine and expensive movements at Waltham. The watch movements formerly manufactured by the E. Howard Clock Company had in no way competed with the product of the Keystone Company, whose movements were neither high-grade nor expensive.

In December, 1902, the common stock (4,000 shares) of the Crescent Watch Case Company of Newark, N. J., was offered to the Keystone Company, and was purchased in the following February, being paid for partly in cash and equivalent obligations, and partly (one-fourth) in the common stock of the Keystone Company. (Later, in 1906, the preferred stock of the Crescent was also bought by the Keystone Company for cash.) The reasons for the purchase were these: The Crescent cases and the movements of the well-known Waltham Watch Company (not the United States Company referred to above) had both been handled by one firm, who acted as the exclusive selling agent for each, so that the sale of Keystone cases to be used with the movements of the Waltham Watch Company was interfered with, and the sale of Crescent cases to be used with other than Waltham movements was also interfered with. The union of the two companies seemed likely to eliminate both these hindrances. Moreover, their respective sales were in different markets, where they competed, not so much with each other as with other manufacturers, of whom there were several actively engaged in business and apparently prospering. The union was voluntary on the part of both companies; the Keystone Company exercised no pressure or coercion upon the Crescent, and the trade of neither was restricted or diminished. Moreover, prices to the public were not raised as a result of the union, except perhaps to a small extent.

From time to time the issued capital stock of the Keystone Company had been increased, reaching $6,000,000 in the end—all of it having been issued for cash—and in 1910 all the assets of the Philadelphia, the Standard, the Howard, and the Crescent Companies were formally transferred to the Keystone Company, and the four companies first named abandoned their separate organizations (which had [510]

theretofore been maintained) and ceased to exist, either actually or in effect.

In 1903 the Keystone Company became interested in the watchcase business in Canada under the following circumstances:

For several years the American Watch Case Company of Toronto, Limited, had been manufacturing in the Dominion, but its plant was not satisfactory, and for this or some other reason its business was for sale. This fact became known to the Keystone Company and to the Elgin and the Waltham movement companies. No one of these three had been able to do much in the Canadian market, owing in part to the tariff of that country, and in part to other reasons not important to enumerate. These three companies determined, therefore, to use the Toronto company in order to enter the Canadian market with Keystone cases, and also with Elgin and with Waltham movements, and to that end bought the capital stock of the Toronto company—the Keystone acquiring 851 shares out of 2,000, and the rest being held largely in the interest of the Elgin and the Waltham companies. The American Watch Case Company has since that time improved its methods of manufacture and has increased its business. Later a selling agent for Canada was organized, in which the Keystone Company owns the capital stock. If this transaction has any relevancy, we need only add that it did not restrain, but rather benefited, the foreign trade with Canada in cases and in movements.

[2] Up to this time we discover nothing unlawful in the operations of the Keystone Company. No doubt it had been growing, and it had grown in part by acquiring or controlling several other plants; but it had not acquired them by improper methods, and it had not used its acquisitions improperly. There was no concealment about its growth, and the trade was well informed about its operations. Its plants were enlarged or improved, the volume of production was increased, prices were not inflated, competitors were not unlawfully attacked, and we find nothing in the evidence that would justify us in condemning the foregoing steps in the company's activity. A merchant may without offense

add one department to another as his business prospers or his ambition expands, for the size and the varied character of his enterprise do not in themselves violate the Anti-Trust Act. Size does not of itself restrain trade or injure the public; on the contrary, it may increase trade and may benefit the consumer; but, if the power given by the volume of a particular business is improperly used to injure either a competitor or the public, or if such power evidently tends toward the injury of either, the mischief either done or threatened is condemned by the statute.

[3] In this connection, it may be observed that, as power increases, the temptation to abuse it is likely also to increase, so that the acts of an influential factor in a particular trade may well be scrutinized with more suspicion than the acts of a weak and inconspicuous contributor. And we have now reached a point in these transactions when we think the evidence establishes that the defendant company did use its power unlawfully. Beginning in 1904, or thereabouts, it made several attempts—perhaps not very numerous, but numerous enough—**[511]** that showed a definite purpose to restrain trade by attempting to fix and maintain prices, and by using a species of boycott or blacklisting in order to lessen the trade of its rivals. We shall not stop to detail the attempts of this character that were made during the period from 1904 to 1910, because the policy and system to which we refer were manifested with unmistakable distinctness in the latter year, and were carried on with vigor and persistence. It will be sufficient, therefore, to state what was attempted, and what was actually done, from January, 1910, forward.

On the 15th of that month the following circular was formally adopted by the Keystone Company's board of directors, and was sent to 131 of the largest and most prominent jobbers or wholesalers in the United States:

"THE KEYSTONE WATCH CASE COMPANY,
"NINETEENTH AND BROWN STS.,
"*Philadelphia, January 15th, 1910.*

"Dear Sir: We inclose herewith our new price list which we are mailing to the retail trade today. These prices are subject to the usual catalogue discount and the case discount only.

Opinion of the Court.

"We also inclose memoranda of the prices at which Boss, Crescent, Planet, Crown, and Silveroid cases and Excelsior watches will be billed in future to our jobbers. These prices are net, subject to the cash discount only.

"These prices are confidential.

"For the best interests of our business we have determined to sell our goods exclusively to jobbers whom we find voluntarily conforming to our wishes as to the disposition by them of such goods.

"We shall make all specific sales, except of Howard watches, without any restrictions whatever.

"Whether or not our wishes as hereinafter stated be complied with, we shall from time to time exercise our right to select the jobbers to whom we shall sell our goods, and we shall, irrespective of any past dealings, refuse to sell to those jobbers who, in our opinion, handle our goods in a manner detrimental to our interests, or whose dealings with us are in any other respect unsatisfactory.

"Our present wishes are as follows:

"First. Our goods bearing the following trade-marks, to wit, Boss, Crescent, Planet, Crown, Silveroid, and Excelsior, will be sold by us to our jobbers at fixed prices, subject to a cash discount, and we desire that sales of these goods by jobbers, whether to retailers or to jobbers, shall be without deviation at the prices fixed by us for sales to retailers, subject only to the cash discount.

"Second. Howard watches are sold only under the terms of the license covering their sales.

Third. On all our other goods we place no restrictions as to the prices at which they are to be sold by jobbers.

"Fourth. And, further, we desire that the jobbers to whom we sell our goods bearing the following trade-marks, to wit, Howard, Boss, Crescent, Planet, Crown, Silveroid, and Excelsior, shall not deal in any watch cases other than those manufactured by us.

"Fifth. All advertisements of our goods will be subject to our approval.

"Very truly, yours,

"THE KEYSTONE WATCH CASE COMPANY."

Officers or agents of the company followed up this circular by visits to the selected jobbers—although perhaps not to all of them—and assured them that the letter meant exactly what it said, and that the policy outlined therein would be rigorously carried out. And it was insisted upon and was carried out. Some of the jobbers assented to the company's wishes, and with more or less reluctance gave up buy[512]ing from other manufacturers, while the jobbers that refused to assent were cut off from the Keystone prod-

uct altogether unless they obtained it through surreptitious channels.

We do not think it necessary to spend time over the foregoing circular. We regard it, not as a request, but as a threat; and not as an empty threat, but as a real menace from a strong manufacturer. The defendant company attempts to justify both the circular and its own conduct before and after the circular was issued, by the argument that the selected jobbers were its "exclusive agents," and therefore were properly burdened with any conditions to which they might agree. But the relation of principal and agent did not exist between the company and the jobbers. They were not agents, paid for their services by salary or commission, and owing a duty to report and account; they were merely customers of the defendant company, who bought its unpatented cases by a transaction of outright purchase, and thereby took a complete title to the cases and acquired an unrestricted right to sell. And, moreover, it should be observed that they were already established customers, not only of the defendant company, but also of its competitors, and had already become trade outlets for every manufacturer of cases whose wares they had been accustomed to buy. Now, what the defendant company did was either to close these already existing and already utilized outlets, or to narrow them materially, so far as the cases of its competitors were concerned; and we think the proposition need not be discussed that this was pro tanto a direct and unlawful restraint of trade.

And it is not sufficient to answer that these competitors appear to have withstood the attack with more or less success, and that their total trade did not always, or even often, diminish. Where or how they made up the loss that they must have sustained is not material; it is certain that they must have lost whatever trade they had previously enjoyed with those jobbers that yielded to the threat of the defendant's circular; and it seems clear, therefore, that in this degree at least there was an unlawful restraint of trade. In other words, if this section of the trade had not been taken away from the defendant's competitors, we may

reasonably suppose that they would have retained it; and this fact seems to be a final answer to much of the evidence, the tables and lists, of varying scope and value, that have been laid before us, and were offered to show that on the whole not much damage, if any, was done by the offending circular and the defendant's unlawful conduct. A recent decision of the Supreme Court on the general subject of blacklisting is *Eastern States, etc., Ass'n* v. *United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, opinion delivered June 22, 1914.

The proportion of the trade in filled cases that the defendant company was enjoying from 1903 onward is in dispute, and is not altogether easy to determine with accuracy; but we shall do the defendant no injustice if we adopt the figures of its counsel and say that:

"When the acquisitions were completed [the company] had from 50 to 55 per cent; when the petition was filed, it had from 42 to 47 per cent."

[513] But we have no hesitation in adding that, even with this proportion of the business, the defendant did not dominate the trade. It had then, and has always had, a number of active and successful rivals, and we see no reason to doubt that there was business enough for all. No complaint on the part of the other manufacturers would have been made or would have been justified, as far as we can determine, if the defendant had not undertaken the policy we have condemned; and it is essentially this—and one other matter to be spoken of presently—that furnishes the Government with just ground for complaint. It is probable that the policy has not been successful, save in a limited degree and for a limited time; but in our opinion it is a plain restraint of trade within the act of 1890, and the Government is entitled to enjoin it.

One or two other matters referred to in the pleadings and in the evidence should be briefly referred to: First, the defendant company's agreements with the Waltham and the Elgin movement companies respectively. These companies are not parties to the bill, and no relief is prayed against the agreements. The subject was introduced by the Gov-

ernment merely as an argument to support its averment that the defendant has been steadily pursuing the definite object of restraining interstate and foreign trade in filled cases. The facts are as follows:

The course of the watch trade in the United States differs from its course in foreign countries. Here, both the jobber and the retailer buy movements and cases separately, and the retailer fits the case and the movement together as the ultimate consumer may desire. But in foreign countries both the jobber and the retailer deal in the completed watch. Efforts by the American companies to change the foreign course of trade were unsuccessful, and it was found that the custom there must be respected, and that watches must be exported in completed form. The agreements referred to were made with the object of securing a share in this comparatively unoccupied field. The Keystone Company obtained from the Waltham and the Elgin companies the exclusive right to sell their movements in certain foreign countries, fitting the movements into the Keystone cases. The Waltham contract covers the continent of Europe, with the exception of France and Spain, and in this territory the Waltham company had previosuly been doing but little business. The Keystone cases were to be made at the Riverside plant, and all the movements were sold to the Keystone Company at favorable prices, for such export trade only. The Elgin contract makes the Keystone Company the sole export jobber of the Elgin movements, except for trade to Canada, and fixes prices of the movements for export only, providing that the Keystone Company shall fit the movements into its own cases, and shall then export the complete watch.

We see nothing unlawful in these contracts. On the contrary, they appear to show a laudable effort to increase American trade with foreign countries. They were intended to help our own merchants in the struggle to enter new markets, and we are unable to find that they operated injuriously to restrain the trade of any American competitor.

[514] [4] The other subject is the system under which the Howard watch was sold. The defendant company attempted

to restrict the prices at which the wholesaler or jobber might sell to the retailer, and to this end made a direct agreement with the jobber. As we understand the decisions, such an agreement was within the company's lawful rights. Certain material parts of the Howard watch were covered by bona fide patents taken out and used for a lawful purpose, and as the owner of these patents the company had the right to make a direct agreement with the jobbers whereby a minimum price was fixed at which the jobber might sell. *Bement* v. *Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Henry* v. *Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. But the company went further, and by mere notice to the retailer, accompanying the box in which the watch was sold by the jobber, attempted to fix the minimum price at which the retailer might sell to the consumer. No direct agreement was made with the retailer. When the company sold the watch to the jobber it had fully exercised its right to vend, and had no right to use the notice subsequently given in order to control the price at which the retailer might sell. *Bauer* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185.

We should end the discussion at this point, if it were not for the recent decision in *U. S.* v. *Harvester Co.* (D. C.), reported in 214 Fed. at page 987. The majority opinion, as we understand it, is put upon the ground that the combination there in question—which was made in 1902, but was not proceeded against until 1912—was and continued to be unlawful because at the beginning it suppressed competition between corporations that controlled about 80 per cent of the trade in harvesting machines. This conclusion was reached, although there was no evidence of coercion in the original combination, and no evidence of oppression or of actual injury to trade in the subsequent conduct of the business. In the principal opinion, Judge Smith says:

"While the evidence shows some instances of attempted oppression of the American trade by the International and the American Companies, such cases are sporadic, and in general their treatment of their smaller competitors has been fair and just; and if the International and American companies were not in themselves unlawful there

is nothing in the history of the expanding of the lines of manufacture, so as to make an all the year around business, that could be condemned.

"The real question is whether the combination of the companies was illegal in the beginning, or became so with the additions subsequently made."

And Judge Hook in his concurring opinion takes the same ground, saying (214 Fed. 1001):

"The International Harvester Company is not the result of the normal growth of the fair enterprise of an individual, a partnership, or a corporation. On the contrary, it was created by combining five great competing companies, which controlled more than 80 per cent of the trade in necessary farm implements, and it still maintains a substantial dominance. That is the controlling fact; all else is detail. * * *

"It is but just, however, to say and to make it plain that in the main the business conduct of the company towards its competitors and the public has been honorable, clean, and fair. Some petty dishonesties were tracked in at the start, mostly by subordinates who had been in the service of the old [515] companies; but they were soon gotten rid of. In this connection it should also be said that specific charges of misconduct were made in the Government's petition which found no warrant whatever in the proof. They were of such a character, and there was so much of them, apparently without foundation, that the case is exceptional in that particular."

Judge Sanborn dissented, on the ground that as the suit was in equity the court had no power to punish past violations of the Anti-Trust Act, but was only authorized to prevent and enjoin further acts violative thereof; taking the position that the question for decision was whether at the beginning of the suit in 1912 the Harvester Company was unreasonably restraining, or attempting to restrain or monopolize, interstate or foreign trade. In considering this question he laid stress upon the argument that the statute forbids such acts only as injure the public unduly in some of the following particulars:

"(1) Raising the prices to the consumers of the articles they affect;

"(2) Limiting their production;

"(3) Deteriorating their quality;

"(4) Decreasing the wages of the laborers and the prices of the materials required to produce them; or

"(5) Practicing unfair and oppressive treatment of competitors."

Opinion of the Court.

After reviewing the evidence, he came to the conclusion on the facts that for at least seven years before the suit was begun the defendant had not been injuring the public, either by unreasonably restricting competition, or by acquiring an undue share of the business, or by excluding other manufacturers or dealers, or by practices that were unjust or unfair or oppressive to competitors, or by raising prices to the consumer, or by limiting production of the articles manufactured, or by deteriorating the quality of such articles, or by decreasing the wages of labor, or by reducing prices of raw materials, and that the defendant was not threatening to do these things in the future. On the contrary, he found that the acts complained of by the Government had had the opposite effect, and had resulted in benefit to competitors, to consumers, to laborers, and to the producers of raw materials.

With this difference of opinion in a strong and highly respected court, it may perhaps have some value if (with some hesitation) we add our own contribution to the discussion of this vastly important and much considered subject. We shall try to state our views briefly, although it may conduce to clearness if we outline the subject from the beginning.

[7, 8] The act of 1890 is directed against restraint of interstate or foreign trade; that is, against restraining the business of buying or selling for gain, whenever the transaction forms a part of commerce among the States or with foreign countries. Trade may be restrained—that is, hindered, or obstructed, or destroyed—in many ways and by many devices, but these are all covered by the first and second sections of the act. In these sections two classes of prohibited acts are described: (1) The concerted action of two or more persons, which may take the form of a contract, a combination in whatever form, or a conspiracy; and (2) monopoly, or the attempt to monopolize, which may be the act of one person alone, or of more than one. These two [516] classes are intended to be all-embracing, and thus far in the history of the statute no variety of device has escaped their sweep.

[9] In the usual meaning of the word, monopoly may be said to be the acquisition of something for one's self, and

perhaps it would be applied most appropriately when the whole of a given trade is acquired. Practically, however, we need not contemplate so extreme a case of control or acquisition, and indeed the act itself is not primarily concerned with an offense so rare. The second section deals with the monopolizing, or the attempt at monopolizing, "any part" of the trade or commerce referred to; and it is clear enough, therefore, that Congress had chiefly in mind, not so much the monopoly of a whole (although the language might properly be construed to cover that also) as the much more likely case of the monopoly of a part smaller than the whole. But the question immediately arises: At what point does a business become so large that the statute condemns it? Or—to state the question in other words—is the mere size of a business enough to bring it within the disapproval of the act? Section 2 gives us no help, for "any" part, if strictly construed, might range from a minute and inconsiderable fraction to a part just less than the whole. If, therefore, a merchant, either an individual or a corporation, by the most commendable zeal and industry should succeed in diverting to himself a very small part of a competitor's business, he would be monopolizing a "part" of the trade, and would be condemned by the letter of the act. And in like manner, if the statute is using the strict meaning of "restraint of trade," no merchant could act in combination with his own partner in successful competition for part of a rival's business, even by the fairest and most honorable means, except at the risk of "restraining" trade. Further examples are needless; many more might be given. Clearly, therefore, as it seems to us, the act could not have been intended to bear a meaning so subversive; and it seems plain that the Supreme Court was abundantly justified in turning to the rule of reason, and in holding that of necessity Congress must have been dealing with undue or unreasonable restraints of trade, whether such restraints take the form of monopolies in whole or in part, or of concerted action under any guise whatever.

[5] But to say that a transaction is undue or unreasonable implies that it has been judged by a standard. The standard

of course is reason, but various questions at once present themselves for answer. For example, who is to apply the standard? The legislation of Congress does not attempt the task itself, and under our system of government the duty must of necessity be undertaken by the courts, who must judge each case according to its own facts. But when such a question comes to be considered, where is a court to find the standard of reason? It seems to us that it must be found in the gradually accumulated results of general experience and observation, in the gathered wisdom of the community, for this is the product of a common and a prolonged effort by men who theorize and by practical men alike to deal as fairly, as justly, and as equitably as may be possible with situations that are often obscure and complicated, and of high importance to large classes and to many individuals. Obviously a standard [517] should have a true relation to the subject measured; and, since the inquiry here is whether in a given case trade is likely to be, or has actually been, unduly restrained, reason can answer the question only by going to the facts of life and drawing upon the accumulated store of knowledge.

Now, the world has already learned some lessons that have become part of its common stock. One of them is that, when men announce their intention of entering upon a given transaction, declaring it to be the accomplishment of a particular object, their declaration may usually be accepted as correct. Not always, of course, but as a rule; and especially is this true if the concealment of their intention would advance their interest. Let us suppose that several persons combine to do certain acts that may or may not have the effect of restraining trade. If they expressly declare their intention to be the restraint of trade, we shall hardly go wrong in believing them. And if such a situation be unlikely, a better illustration may be found in supposing that they agree to do the acts, but say nothing about their intention. In that event, if according to the common course of experience and observation the acts proposed will certainly have the result of restraining trade, their unexpressed intention will be of no consequence whatever; neither will it be

of any consequence, if the reasonable probability be that trade will be restrained by the proposed conduct.

But another and ordinarily a better way of determining whether a course of conduct under examination is in restraint of trade is sometimes available, and that is by considering its actual effect. It goes without saying that such a test can only be applied after the course in question has actually been carried out in some degree—has actually been tried by experience; and this leads to the further question: When should the standard of reasonableness be applied? Evidently this will depend on the time when the question is submitted for decision. This time may either precede the proposed course of conduct, or it may follow the beginning of such a course so quickly that no body of experience, or no sufficient body, has yet come into existence. In that event the nature of things compels the court to enter the field of prophecy, or of probable anticipation. In such a situation, nothing else can be done. A court can only deal with the situations that are laid before it, and in the case supposed it must avail itself of whatever light may be had, and must exercise its best judgment with such aid as may be at hand. But, if the suit be deferred until the lapse of time and the actual effect of the conduct complained of have permitted facts to accumulate and have tried the project in question by the test of experience, we can hardly doubt that prophecy or probable anticipation should be considered inferior in force to the evidence of what has actually taken place. In this world we must do our best with the means at our disposal. Even if prophets are always in danger of being discredited by the event, we are sometimes compelled to speculate about the future; and our duty then is to check our speculations as much as possible by taking account of such probabilities as may arise from past experience and observation. In like manner, when we are face to face with what has actually happened, we may safely lay prophecy [518] aside, in order to accept the services of a better guide, one that can be relied upon with a firmer confidence.

[6] And this brings us to the next question, no matter at what point of time the inquiry may be undertaken, namely: What are the ordinary marks of such a course of conduct as

may properly be condemned as a restraint of trade? Without attempting to enumerate them exhaustively, a few general observations may be made. Trade is restrained by putting hindrances in the way of the persons that conduct it. Whatever makes it more difficult for such persons to carry on their business restrains them, and restrains their trade; but (to speak generally) as every successful effort of a merchant to increase his own trade makes it harder for his rivals to succeed, and therefore restrains their trade, and as Congress certainly did not intend to condemn the proper exercise of business zeal and energy, we must recur to the rule of reason and ask—not merely what is restraint of trade, but what is unreasonable restraint of trade? On this subject we are certainly able to say some things with confidence. Competitors must not be oppressed or coerced; fraudulent or unfair or oppressive rivaly must not be pursued. And if these words are criticized as too general, we may reply that such generality is apparently unavoidable, as some recent legislation of Congress testifies, and, moreover, we may safely deny that the words are too vague for satisfactory use; for it must be remembered that the common agreement of moral opinion in the community furnishes an adequate guide to their practical meaning and their practical application. They are not likely to be misapprehended or misapplied. Then, too, prices must not be arbitrarily fixed or maintained. Ordinarily the play of the great forces that influence the market will determine prices, and these forces must be allowed to have their unhindered effect. And a corrollary from this consideration is that an artificial scarcity must not be produced, since the effect of such a scarcity is to raise prices to the consumer. Moreover, the public is also injured if quality be impaired, so that the old price buys a worse article; and other injuries are done, if the wages of the laborer be arbitrarily reduced, and if the price of raw material be artificially depressed.

In the complexity of human affairs there may be other methods of unreasonably restraining trade, and these may be left for consideration as they are made to appear; but those already referred to are the methods that have usually been employed, and we need not enter the field of conjecture. Now, if all or some of these marks of unlawful restraint be

present or may fairly be expected, the statute requires the application of an appropriate remedy; but if none of them be present, after sufficient experience has shown what will actually happen, on what satisfactory ground is condemnation to be pronounced? Not, we think, merely on the ground of size. As population has swelled, and as vast aggregations of men have multiplied their wants, the inevitable trend of modern affairs has called for large business enterprises, as well as for small; and we think it no more than reasonable to say that, when a large business has proved itself to be beneficial and not harmful to the community, it should not be condemned merely be**[519]**cause it is large. We do not consider, and we do not deny, the right of a nation to adopt such a legislative policy in this respect as its constitution may permit; but, until a policy of limitation be so adopted, we see no possible test of reasonableness to be applied except such tests (and those like them) as have already been sufficiently referred to. And, from whichever side the subject may be approached—from the side of what is likely to happen, or from the side of actual experience—the standard of reasonableness should be applied according to the facts and circumstances of the particular case under examination.

As will no doubt be observed, we have already applied the rules we have been considering to the case in hand, and have expressed our opinion concerning the several acts of the defendant company that are attacked by the Government, so that we need say nothing further except a word concerning the relief that should be granted. The defendant declares that the policy of boycott had been given up before the bill was filed—and there is some testimony to this effect—but the circular has never been withdrawn or negatived, and the company's resolution of January, 1910, has never been rescinded. We feel no hesitation in acting on the assumption that the policy was at least formally in force when the Government began the suit now before us, and we have no doubt that an injunction should be granted. But we see no sufficient evidence that the public interest requires us to break up the existing corporate entity. *U. S.* v. *Great Lakes Towing Co.* (D. C.), 208 Fed. 746. The record satis-

fies us that the watch case business is not suffering from the absence of live and healthy competition, and except in the directions already mentioned—namely, the retail sales of the Howard watch and the policy of boycott—we think the court is not called upon to interfere. But, in case conditions in the future should make it desirable for the Government to ask for additional relief, even to the point of breaking up the defendant corporation, we shall retain jurisdiction of the bill, with leave to the Government to take such action hereafter as may seem appropriate.

A decree may be drawn in accordance with this opinion.

SPERRY & HUTCHINSON CO. *v.* FENSTER ET AL

(District Court, E. D. New York. January 16, 1915.)

[219 Fed. Rep., 755.]

MONOPOLIES 17—STATUTES—TRADING STAMPS.—Act Cong. October 15 1914, c. 321, § 3, 38 Stat. 731, prohibiting the making of a contract fixing the price for merchandise on condition that the lessee or purchaser shall not use or deal in the merchandise of a competitor, if the effect of the contract is to substantially lessen competition or tend to create a monopoly, does not prohibit a trading stamp concern from restricting redemption privileges to subscribers under contract with it binding such customers to distribute stamps only to customers.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

ASSIGNMENTS 5—VALIDITY—TRADING STAMPS—REDEMPTION—"PROPERTY RIGHT."—Where complainant, a trading stamp concern, issued redeemable stamps only to subscribers under a contract by which the latter agreed to distribute the stamps only to customers, the right to redeem the stamps was a property right transferable by possession, while the license to use them for advertising purposes was not transferable without compensation to complainant, and hence complainant was entitled to enjoin the use of its stamps for advertising purposes by persons who had obtained them from subscribers in violation of the restriction.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 7-10; Dec. Dig. 5.

For other definitions, see Words and Phrases, First and Second Series, Property Rights.]

Opinion of the Court.

[756] In Equity. Bill by the Sperry & Hutchinson Company against Murray Fenster and others. Application for temporary injunction granted.

John Hall Jones, of New York City, for plaintiff.

Prindle, Wright & Small, of New York City, for defendants.

CHATFIELD, District Judge.

The plaintiff seeks a preliminary injunction against several defendants, one of whom is in default, one appears in person, and the others are represented by attorney. The latter raises objections which go substantially to the issuance of any injunction upon the bill and petition, so that the matter will be considered in its entirety.

The papers show the usual condition presented in similar suits in which the defendants have obtained S. & H. Green trading stamps, under conditions equivalent to a purchase from the subscribers for these stamps, and are giving them to their own customers, and advertising so to do, as an inducement for trading.

It has been previously held, in a number of cases, that the plaintiff can restrict the giving of Green trading stamps, as a present or premium to customers, to the so-called "subscribers" who obtain under contract the right to give out these coupons (exchangeable for various premiums) by paying a consideration therefor and by agreeing to distribute the stamps only to customers. In other words, the subscriber contracts not to assign or transfer the advertising benefits which he expects to obtain from his purchase of stamps to be given to his customers who thus acquire the privilege of selecting a premium by holding evidence of having traded with that particular dealer to a certain amount.

The defendants contend that the plaintiff's practice of seeking to enjoin (and even in certain State jurisdictions to punish by prosecution) dealers who are using such trading stamps as an inducement to their customers to transact business, without having subscribed for the right so to do, and

without having obtained the stamps by payment therefor to the company issuing the stamps, is contrary to the present decisions of the United States Supreme Court and to the provisions of the laws forbidding monopoly.

[1] The last statute upon this subject, known as the Clayton Law, and approved by the President upon the 15th day of October, 1914, provides in section 3 against the making of a contract or fixing of a price for merchandise on condition that the lessee or purchaser shall not use, or deal in, the merchandise of a competitor, if the effect of this contract would be to substantially lessen competition or tend to create monopoly. This statute forbids the converse of the acts complained of in the present action, and we have nothing to do with what might happen if the Green trading stamp people were seeking to forbid the use by its subscribers of any other kind of trading stamps. This might or might not be a restriction upon competition or tend to effect a monopoly.

Nor does the case of *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, control the present application. If the Sperry & Hutchison Company refused to redeem [757] their coupons solely upon the ground that the coupons had been transferred after purchase from a subscriber, the Bauer case, supra, would necessitate the ruling that such refusal to redeem would be justified only in case the party seeking to redeem had induced or knowingly assisted in some breach of contract.

The case of *Bobbs-Merrill Co.* v. *Straus et al.*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, cited by the defendants, and the case of *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, decide that the vendor of goods which had been once sold at a price giving to that vendor all the profit which it could ask could not then restrict the further sale, at a loss, to the party making the resale.

Inasmuch as it was held that the rules of business competition did not require and would not allow the prohibition of transfer of articles in a way which would not affect the rights of the original vendor, the contracts seeking to pre-

vent the subsequent sales were held to be in restraint of trade, contrary to the Sherman Law and the principles of common law.

[2] But the sale of trading stamps is much more like the transactions considered in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, in that the reason for insisting upon a contract is to restrict the sharing in a certain legitimate privilege, to those who pay for the privilege, and to prevent, by a mere transfer of the trading stamps, the bestowal of the advantage of giving out the stamps, and of getting trade thereby, upon any person who might by holding the stamps be entitled to claim the rights of redemption.

It is evident that the intent and acts of persons taking the stamps and seeking to redeem them for a certain premium, and also the resultant benefits to that person, are entirely different and are based upon substantially different rights from those of a party who is seeking to attract customers and to build up his own trade through the privilege of dealing, as it were, in trading stamps, without payment for that privilege and with no intention of getting the goods for which the stamps are redeemable.

The right to redeem the stamps is a property right transferable by possession while the license to use them for advertising purposes is not transferable without compensation to the person granting that right, viz, the plaintiff herein.

This is exactly the distinction which seems to have been had in mind by Judge Thomas of this court in the case of *Sperry & Hutchison Co.* v. *Benjamin Benjamin et al.*, 221 Fed. 512 (March 27, 1905), and it is unnecessary to postpone the determination of this question as now raised until final hearing, for the reason that the defendants do not plead ignorance of the existence of some contract under which the trading stamps were issued; nor are they merely claiming to be innocent holders of particular stamps for which they have given a valid consideration. They are, on the contrary, insisting upon their right to knowingly and deliberately purchase from the licensee the benefits granted for a limited use and which they know could only be obtained by themselves by paying for one of the contracts above referred to.

Syllabus.

[758] The distinction suggested by the defendants, that they have not sought to induce anybody to break the contract, but that they have purchased these stamps in the open market, is no defense, in the face of actual notice to them that the stamps are not and could not be obtained from the Sperry & Hutchison Company, except by some one who had entered into a subscription and paid for the privilege of obtaining them.

Temporary injunctions will issue.

BOYD ET AL. v. NEW YORK & H. R. R. CO. ET AL.

(District Court, S. D. New York. January 29, 1915)

[220 Fed. Rep., 174.]

COURTS 347—EQUITY RULES—PLEADING—ANSWER.—Under the new equity practice, defendant is required to show all his propositions, whether of law or fact, at once in the answer, and the court, on a motion to determine points of law authorized by Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), may consider whether, in view of the facts alleged, any of the legal theories propounded can properly be considered before testimony taken, or by merely taking such evidence as has previously been often adduced in support of a plea, so that, when defendant claims that the complaint shows no case for equitable relief, he may not complain if the court considers the admissions or allegations of the answer which explain or enlarge, but do not contradict, the allegations of the bill.*

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. 347.]

COURTS 347—EQUITY PRACTICE—DEMURRER.—One whose answer, under the reformed equity practice, objects generally to the bill, must be considered as having done so not only on what complainant shows, but also after having had his own conscience purged.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. 347.]

EQUITY 184—SEVERAL DEFENDANTS—DEMURRERS BY ONE.—Where one of several defendants to a bill, after stating his own actions or position by answer, raises an issue of law, and other defendants deny knowledge regarding the first defendant, any relief to which complainant is entitled on the statement of such defendant would not be stayed by an allegation of his co-defendant's lack of knowledge,

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Syllabus.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 422–425; Dec. Dig. 184.]

EQUITY 371—PRACTICE—MATTERS OF LAW—DETERMINATION BEFORE TRIAL.—A legal proposition, going to less than the whole case made by a bill in equity, should not be decided in advance of final hearing, unless such decision will add to or eliminate from the case a clearly defined and easily stated mass of testimony, the presence or absence of which will not change or affect the method of presenting other aspects of the litigation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 782; Dec. Dig. 371.]

COURTS 347—PRACTICE—RULES—PRAYERS—"ALTERNATIVE"—"CAUSE OF ACTION."—The term "alternative," as used in Equity Rule 25 (198 Fed. xxv, 115 C. C. A. xxv), allowing relief to be stated and sought in alternative forms, means mutually exclusive, and the term "cause of action," being defined as composed of the right of the complainant, and the obligation, duty, or wrong of the defendant, combined, a bill praying the destruction of a railroad lease as obnoxious to the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1913, § 8820]), and also the preservation of the present status of the stock of the lessor company which depended entirely on a lease sought to be annulled, was not fatally defective because the prayers were inconsistent.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. 347.

For other definitions, see Words and Phrases, First and Second Series, Cause of Action.]

[175] MONOPOLIES 10—RAILROAD CONSOLIDATION—LEASE—SHERMAN ACT.—If a railroad lease created a control or unity of competing interests forbidden by the Sherman Act, the fact that it long antedated the statute did not render the act inapplicable.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. 10.]

MONOPOLIES 24—RAILROAD LEASE—SHERMAN ACT—INVALIDITY—PRIVATE INTERESTS—RIGHT TO SUE.—Minority stockholders of a railroad company in private litigation have no right to enforce the Sherman Act to set aside a prior lease of the assets of one company to another, but may invoke the law to prevent a subsequent consolidation prejudicial to their rights and involving a breach of contract.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

RAILROADS 142—CONSOLIDATION—EXERCISE OF RIGHT—CONTRACTS.—The right of railroads to consolidate, given by a State statute, is merely permissive, and hence it is no violation of the statute for a railroad to contract against the exercise thereof.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 444–447; Dec. Dig. 142.]

Statement of the Case.

CORPORATIONS 180—LEASE OF ASSETS—CONTROL—MINORITY STOCKHOLDERS.—Where a railroad corporation controlled another corporation by its ownership of a majority of the stock, and also by a lease of its property, it was a trustee of such property for the minority stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 665–673; Dec. Dig. 180.]

RAILROADS 144—CONSOLIDATION—LEASES—RIGHT TO CONSOLIDATE—MINORITY STOCKHOLDERS.—Where, under existing leases and contracts, the dividends or annual returns on stock of the H. Company, a majority of which was owned by the C. Company, which was operating the H. Company's railroad under a lease, must be paid before the C. Company's stockholders could obtain anything, and, if this was not done, the system by which the C. Company obtained access to its terminal station in New York City would be disastrously affected, and the H. Company's shares were worth, by reason of such guaranty, many times what the shares of the C. Company were worth, the minority shareholders of the H. Company were entitled to enjoin the C. Company from dissolving such rights by a consolidation.

[Ed. Note.—For other cases see Railroads, Cent. Dig. §§ 392, 393, 451–455; Dec. Dig. 144.]

Bill by John Scott Boyd, Junior, and others, against the New York & Harlem Railroad Company, and the New York Central & Hudson River Railroad Company, and others, to restrain a consolidation between the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company. On motion by complainants under Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) for decision of points of law in respect to the cause or causes of action stated in the bill, raised by portions of the answer of defendants or some of them. Motion granted.

[176] *John S. Sheppard, jr.*, and *William N. Cohen*, both of New York City, and *Jacob M. Dickinson*, of Chicago, Ill., for complainants.

Alexander S. Lyman, of New York City, for defendant New York Cent. & H. R. R. Co.

Anderson & Anderson, of New York City, for individual defendants and the New York & H. R. R. R. Co.

Charles F. Brown, of New York City, for all defendants.

HOUGH, District Judge.

The defendant railway corporations (hereinafter called, respectively, the "Harlem" and the "Central") are too well known to need description. The individual defendants are directors of both railways, and constitute a majority of each corporate board. The complainants are stockholders in the Harlem and citizens and residents of States or countries other than New York.

The object of the bill is to enjoin a consolidation of the Harlem and Central; "consolidation" meaning that merger of railroad corporations into one company permitted by the railroad law of New York (chapter 49, Consol. Laws; chapter 481 of 1910, as amended by chapter 506 of 1911).

The legal propositions advanced by complainants as justifying their demand are: (1) That consolidation would violate the contractual rights of Harlem shareholders—rights secured by the written agreements under which the Central has long operated the Harlem properties as an integral part of the transportation system usually described as the "New York Central Lines." (2) Such consolidation, by producing legal unity of two railways in addition to the present centralized control, would be a violation of the "Sherman Act." And (3) even the existing control of the Harlem by the Central, though based upon contracts made long before the passage of the "Sherman Act," became unlawful when that statute sprang into existence, and is to-day a violation of Federal law.

The business reasons impelling complainants to prefer Harlem stock to that of any company formed by the union of Harlem with Central may be summarized from the allegations of the pleadings, thus:

The Harlem owns a railroad from Forty-second Street, New York City, to Chatham, N. Y., with a branch from Melrose to Port Morris, where it meets the Central's track; and such ownership and junction existed in 1873.

In that year the Central leased the Harlem for a term of centuries under a rental scheme which included a payment direct to Harlem shareholders, of so large an annual return that for each share of Harlem stock the Central (with the

consent of the New York Public Service Commission) has publicly offered 3½ times its par value.

The terms of the lease of 1873 also relieved the Harlem from the necessity of providing for the fixed charges on its bonded indebtedness, the burden of which has, by advance in values and diminution in interest rate, become trifling.

By a supplementary agreement of 1882, ratified by the stockholders of both Central and Harlem, the two companies disabled themselves from changing the terms of rental during the period of demise, and, in "order to secure the individual interest" of each Harlem shareholder, [177] every such holder was specifically authorized to "prosecute such suits as may be necessary in the premises, to recover his proportionate part" of the stipulated rental, i. e., the guaranteed dividend on Harlem shares; a dividend increased in 1898 by allotment to the Harlem shareholders of part of a saving in interest effected by a refunding of the company's bonded debt.

The payment of annual returns on Harlem stock is peculiarly well secured, by the fact (so well known as to require no proof) that the transportation service of the New York Central Lines enters Manhattan Island, and enjoys the advantages of the Grand Central Station, by using the Harlem's right of way. The terminal facilities of 1873 have (as stated in the answers) been greatly enlarged by the Central's funds, but it still remains true that the property conveyed by the Harlem lease is of vast, though unascertained, value, and vital to the activities (as at present arranged) of the Central in the city of New York.

The intrinsic value of Harlem's property is alleged to be "not less than two hundred million dollars" over a bonded indebtedness of $12,000,000 only. This is denied; but an offer of 3½ times par for the stock (of which there is and can be but $10,000,000 par) proves an opinion of value on the part of the principal defendant consistent only with a security of return as nearly absolute as the possibilities of business, politics, invention, and war will permit.

The foregoing is more than a digest of the bill; some facts (not inconsistent with any statement by complainants) are taken from the answers.

The reasons for demanding relief now are alleged to be that especially of late years the Central has bought Harlem stock, until it owns to-day 62 per cent thereof. No more than 66⅔ per cent is needed to carry through a consolidation under the laws of New York. Such merger would extinguish the lease which in effect pledged the Central's own property and earnings to satisfy the price of hiring, and leaves the Harlem free to take back its vastly appreciated estate if the price be not paid; and for such singularly desirable security would substitute mere participation in a united and more heavily incumbered property, where the much larger Central stock could always outvote the Harlem interest, and subject the present securely segregated Harlem property to the lien of mortgages demanded by the needs and ambitions of the Central.

As to whether consolidation is intended by the Central, the answers of the Harlem and the individual defendants profess ignorance; but the Central itself, while denying any purpose of presently acquiring absolute control of the Harlem's railroad properties, admits and asserts:

"That it has in view and is favorably disposed towards at some future time the uniting and vesting in one corporate entity of all the properties and franchises of the Central Company with those of the Harlem Company, demised by said lease, whether by consolidation or otherwise, and that it intends to exercise such rights as are incidental to the ownership of capital stock in said Harlem Company."

The answer then proceeds to argue that Central has spent so much money on Harlem's properties, and will be obliged to spend so much more, that:

[178] In order "to meet the public needs * * * the acquisition of as large a proportion of (Harlem's) capital stock as is reasonably practicable is in pursuance of a just and prudent policy on the part of this defendant."

The Central might as well have said plainly, "We shall buy all the Harlem stock we can, and merge the companies as soon as we think best."

The pleadings are under the equity rules of February 1, 1913, and each answer contains matter tendering issues of law. Complainants have thereupon made this motion.

Opinion of the Court.

The matter specified in the notice of motion may in part be described with accuracy, in terms of the old practice. The Central has demurred generally to the whole bill.[a]

All the defendants have asserted by answer that private complainants cannot in this form of action avail themselves of the prohibitions of the Sherman Act, and all assert that the consolidation of the Harlem and Central is not within the purview of the statute.[b] With some hesitation I think these contentions would formerly have been raised by motion to expunge.

These probable equivalents are referred to only as aids in passing from old to new; for, if the modern practice is worthy of acceptance, its excellence will not arise from doing only the old things under new names. The new method must show itself a better, quicker, more far-reaching instrument for ascertaining truth; otherwise it were folly to trouble ourselves with new names.

[1] There is nothing novel in embodying and presenting legal propositions in an answer, and the points thus presented may be of every degree of importance.

What is new is the obligation on defendant to show all his propositions at once, whether of fact or law, and let opponent and court consider whether, in view of the facts alleged, any of the legal theories propounded can profitably be considered before testimony taken; or by taking merely such evidence as has heretofore been often adduced in support of a plea.

Evidently this casts a burden upon judicial discretion hitherto unknown. Many a judge has heard in succession a demurrer, a plea or two, and several motions before getting to an answer, and never seen, nor thought he had a right to see, the whole defense at a glance. Whether the panorama now afforded is real reform depends almost altogether on how sympathetically and skillfully the new procedure is

[a] This is the effect of sections 1 and 6 of the motion, taken together.

[b] This is thought to be the result of sections 4 and 5 of the motion. Motion paragraphs 2 and 3 will not be further referred to. I consider the specified parts of the answers as merely irrelevancies, provoked by superfluous allegations in the bill.

administered. That early efforts will sometimes be mistakes is to be expected.

This case affords opportunity and imposes necessity of considering at least two points, which are of importance to the scheme of procedure, and not merely in this litigation: (1) Where an answer asserts that the bill states no case, can any fact allegations of defendant's pleading be considered? (2) When defendants raise legal propositions go[179]ing to less than complainant's whole case, what test can be suggested to guide the court in deciding whether to consider or decline the points in advance of final hearing?

On the first point, it seems to me clear that, when defendant alleges that complainant shows no case at all, he cannot complain if the court considers any admission or allegation of the answer which explains or enlarges (but does not contradict) the bill of complaint.

[2] One who "demurs generally" nowadays must be understood to do so, not only on what complainant shows, but also after having had his own conscience purged. Thus only is avoided the old and bad habits of trying everything else before stating facts.

[3] Similarly, where one defendant demurs after stating his own actions or position, and other defendants deny knowledge regarding the first defendant, any relief to which complainant is entitled on the statement of No. 1 will not be stayed by his fellow's lack of knowledge.

For these reasons I have above recited the Central's admissions as to consolidation, and feel free to act on them, notwithstanding the ignorance of the other answers.[a]

[4] On the second query, I am of opinion that no legal point (going to less than the whole case) should be decided in advance of final hearing unless such decision will add to or eliminate from the case a clearly defined and easily stated mass of testimony, the presence or absence of which will not change or affect the method of presenting the other aspects of the litigation.

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[a] It is at least difficult to understand how a majority of the Central's directors can deny knowledge of what the Central itself states at length.

Opinion of the Court.

Applying this to the case at bar, it seems advisable now to pass upon the applicability of the Sherman Act, because the propositions of complainant evidently require much expensive fact evidence for ultimate solution, which (if defendants are right) it will be useless to prepare and present.[9]

[5] There is one criticism of the bill, mentioned in arguments and briefs, to which preliminary consideration may be given. It is urged that the bill contains two inconsistent "causes of action." It does, in my opinion, show inconsistent prayers for relief, because it demands (1) the utter destruction of the lease of 1873, as obnoxious to the Sherman Act, and also (2) the preservation of the present status of Harlem stock, which depends wholly upon the very lease sought to be annulled.

But it is not thought that such inconsistency is either fatal to the bill, or constitutes a serious blemish thereupon, and for two reasons: First, the prayers of a bill are not parts of the cause of action therein set forth; and, second, inconsistent and even contradictory prayers are permitted by Equity Rule 25 (198 Fed. xxv, 115 C. C. A. xxv), which allows relief to "be stated and sought in alternative forms." "Alternative" means "mutually exclusive" (Cent. Dict.), and no phrase could more happily describe the prayers of this bill. "Cause of [180] action" has not been found easy of definition. But Prof. Pomeroy's effort, that it is "composed of the right of the plaintiff and the obligation, duty, or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute a cause of action," has been adopted in *Veeder* v. *Baker*, 83 N. Y. at page 160; while the shorter statement of *Durham* v. *Spence*, L. R. Ex. Cas., 46, that it "is that which produces the necessity for bringing an action" has been approvingly quoted in *Shelby, etc., Co.* v. *Burgess Co.*, 8 App. Div. at page 448, 40 N. Y. Supp. at page 873.

[9] If this view of the new practice prevails, it furnishes an argument for the suggestion often made that each equity case be assigned in limine to a particular judge—a system which would at least make for speed and consistency.

In the light of these definitions, I find in plaintiffs' "statement of the ultimate facts upon which" they ask relief, only one cause of action; for their right is single, viz, to preserve their property, the duty of the defendants is to cooperate in such preservation; and the wrong alleged is a threatened trespass upon that right.

The prayers are but the opinions of the plaintiffs as to the proper method of redress, and inconsistency there is harmless. The court must select that method which is appropriate and lawful, and such procedure as is illustrated by this motion will produce a selection with the minimum expenditure of time and expense.

A very great interest in the new procedure must excuse the foregoing rather lengthy preface.

I have stated complainants' three propositions, and will consider them inversely to the order of statement.

[6] If the lease of 1873 created a control or unity of competing interests forbidden by the Sherman Act, the fact that such obnoxious arrangements long antedate that statute does not render the act inapplicable. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671.

[7] Complainants, however, have no standing to demand in this private litigation the abrogation of the lease, the restoration of the status of 1873, nor the sale by the Central of its Harlem stock. (First and second prayers for relief.) Such efforts are a usurpation of the functions of the executive; it does not lie in the power of private citizens to assume at will the duties of an attorney general. Actions thus privately brought would be even more privately settled. The certain scandal and endless confusion resulting from such freedom of action are the sufficient reasons for cases like *National Fireproofing Co.* v. *Mason Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

But if private litigants have and seek to assert a private right which is molested, or in danger of violation; and if such actual or threatened infringement consists not merely in contract breaking or other private delict, but also gives

Opinion of the Court.

rise to transgressions of public law—then private litigants may invoke that law and urge as an additional and potent reason for protecting their private rights the fact that the threatened assault upon the same will constitute not only a breach of obligation but a public wrong. *De Koven* v. *L. S. & M. S. Ry. Co.* (D. C.) 216 Fed. 955.

It follows that in this case the Sherman Act is measurably applicable; and if it be shown that the contractual relation of centralized control now existing between the Central and the Harlem, directly and not in[181]cidentally affects interstate commerce, that such relation constitutes an actual or attempted monopoly or restraint of interstate trade, that such restraint is unreasonable, and the merger or consolidation permitted by the statutes of New York would be an act extending and strengthening a control already contravening rational law, or creating a new relation or union illegal under Federal statutes, then findings of the nature just outlined would be ground, not for uprooting all that has been done, but for maintaining the present status, and complainants' present rights, until such time as the Attorney General chooses to act. But obviously much evidence is necessary to decide whether the facts warrant any decision based on the Sherman Act.

There remains the inquiry whether the consolidation asserted as imminent in the bill, and admittedly desired by the Central, would be a violation of plaintiffs' contractual rights, independently of the Sherman Act.

[8] The right to consolidate is merely permissive; it is no violation of any statute to contract against the exercise of such a right. Noyes' Intercorporate Relations, §§ 18 and 24.

[9] There cannot be any public policy of the State of New York rendering it obligatory upon these corporations to unite; for the Central is a trustee by virtue of its control of Harlem stock, and the plaintiffs and other minority shareholders are its cestuis que trustent. *Farmers' L. & T. Co.* v. *New York & Northern R. R.*, 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689. Possibly minority shareholders who obstructed a public enterprise might have

their property taken for the public good, by some proceeding in the nature of condemnation; but no such statutory remedy exists at present.

[10] The act authorizing consolidation (supra) requires that upon any merger the capital stock of the consolidated company shall not—

"exceed the sum of the capital stock of the corporations so consolidated at the par value thereof. Nor shall any bonds or other evidences of debt be issued as a consideration for, or in connection with, such consolidation." Section 141.

It follows that the only method by which the superior value of Harlem as compared with Central stock can be maintained, is by giving to Central shareholders less than share for share, and by no method can Harlem stock (as represented by consolidated stock) be assured that preferred position which it now occupies.

Under existing leases and contracts, the dividends or annual returns on Harlem shares must be paid before the Central shareholders can obtain anything, and, if this be not done, the system by which the Central obtains access to the Forty-second Street Station is disastrously dislocated.

Consolidation would therefore mean not only an exchange of shares of one name for shares of another, or of a thing of one kind for another thing of the same kind, but would involve a complete destruction of investment in character and quality. Existing arrangements give to Harlem shares rights preferred over all Central stock in the earnings of the entire system now consolidated in control. After consolidation, Harlem shareholders might have more shares, but "shares" would not [182] mean the same thing, and the return thereon would necessarily be subject to greater and more numerous hazards than is now the case.

The agreement of May 15, 1882, is a sufficient justification to these plaintiffs for protecting their interests by direct suit, and the same document amounts to a lawful undertaking on the part of the Central always to pay to each and every shareholder in the Harlem that holder's proportion of the "annual rent reserved by and to be paid under" the lease of 1873.

Opinion of the Court.

Any possible form of consolidation now authorized by the statutes of New York must involve a breach of this contract on the part of the Central; for, whatever Harlem shareholders may get after merger, they can never get their share of the "annual rent" reserved by the lease of 1873.

It results that in my judgment the complainants' bill does set forth a cause of action, and that such cause of action is established by the answers to the extent of entitling complainants to the relief demanded in the third prayer of the bill, viz, that the Central and the Harlem and the said defendant directors be enjoined during the term of the lease of 1873 from taking any steps toward consolidating said companies, or merging the Harlem with any successor to the Central.

An order may be entered declaring, in substance: (1) That the bill of complaint does contain facts sufficient to constitute a cause of action. (2) That the matter alleged in the eighth and sixteenth paragraphs of the complaint (applicability of Sherman Act) are material and relevant to complainants' alleged cause of action, and may (if hereafter supported by competent evidence) afford ground for relief additional to that arising from complainants' contractual rights.

As the result of this motion, the parties are advised that, if complainants choose to move on the pleadings for an injunction pendente lite embodying (mutatis mutandis) the third prayer for relief, such motion will be granted; and, if they elect to abandon the Sherman Act as a basis for action, a final decree for permanent injunction, as sought in said third prayer, will be forthwith granted.

In the language of rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), I think, after considering the answers, that there is no "principal case" for trial, so far as plaintiffs' contractual rights are concerned.

Syllabus.

HITCHMAN COAL & COKE CO. *v.* MITCHELL ET AL.[a]

(District Court, N. D. of West Virginia. December 23, 1912.)

[202 Fed. Rep., 512.]

TRADE-UNIONS (§ 1)—STATUS UNDER COMMON LAW.—Under the common law which governs in West Virginia, labor-union combinations must be considered in their threefold relation: (a) To their own members; (b) to those who may employ such members; and (c) to the public interests.[b]

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 1; Dec. Dig. § 1.]

MONOPOLIES (§ 12)—STATUS AND POWERS UNDER COMMON LAW—RELATIONS TO MEMBERS.—In their relation to their respective members, labor unions cannot undertake to require by oath, obligation, constitution, by-law, or rule, a surrender by such members of their individual freedom of action, and, when they seek to do so, they become illegal combinations in restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 12)—STATUS UNDER COMMON LAW—LEGALITY.—The question of the legality of a labor-union combination is to be determined from an examination of the union's constitution, by-laws, or rules, as they may be called, and, where some of such rules are lawful, yet, if others unlawful in character are of such weight and importance as to dominate the course of the union's action, or if the lawful and unlawful ones are so interdependent or intermingled as to render their separation impracticable, the organization becomes wholly illegal as in restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MASTER AND SERVANT (§§ 338, 339)—INTERFERENCE BY THIRD PERSONS.—Labor unions in their relations to employers of their members, while they may use all peaceful efforts to advance the interests of their members in the way of aiding them to secure better wages, shorter hours of labor, and better conditions in which to work, may not accomplish these ends by violence, coercion, or intimidation on their part or at their instance. They may not induce their members to break existing contracts with their employers, nor interfere by intimidation or coercion with the inherent right of the

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[a] For opinion of Circuit Court of Appeals reversing decree and dismissing bill (214 Fed. 685), see *post*, page 589.

The case is pending on appeal in the Supreme Court.

[b] Syllabus copyrighted, 1913, by West Publishing Company.

Syllabus.

employer to control his property and conduct his business in any lawful manner he may choose, and while they have the lawful right to advise their members to strike, where not in violation of contracts, and by reasoning or persuasion endeavor to prevent others from taking their places, neither they nor their members have any right by intimidation or coercion to prevent other laborers or any of the members of the union from taking employment with such employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1283; Dec. Dig. §§ 338, 339.]

MONOPOLIES (§ 12)—ILLEGAL COMBINATIONS—LABOR UNIONS.—Neither a labor union nor its members may, under the law, use any means of coercion or intimidation to compel others to join the union, or to prevent a member from leaving the union if he desires or otherwise to interfere with the inherent right of the individual, whether a member or not, to dispose of his own labor or capital according to his **[513]** own will; and in their relations to the general public as consumers of the products of labor and capital such unions are governed by the same rules of law as to combinations in restraint of trade as are combinations of capital.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 12)—CONSPIRACY (§ 8)—ILLEGAL COMBINATIONS—UNITED MINE WORKERS OF AMERICA.—The United Mine Workers of America is an unlawful organization because of its principles as set forth in its constitutions, obligations of its members, and rules which (1) require its members to surrender their individual freedom of action; (2) seek to require in practical effect all mine workers to become members, whether desirous of doing so or not; (3) to control and restrict, if not to destroy, the right of the mine owner to contract with his employés independent of the organization; (4) to exclude his right to employ non-union labor if he desires; (5) to limit his right to discharge, in the absence of contract, whom he pleases, when he pleases, and for any cause or reason that to him seems proper; and (6) assume the right through its officers to control the mine owner's business by shutting down his mine, and calling out his men upon indefinite strike in obedience to their obligation to the union, whether the men desire to quit work or not, whenever such officers deem it to the best interests of the union and regardless of his rights or interests, or the loss, direct and indirect, which he may sustain. It is also unlawful because of its procedure and practices, in that (1) it seeks to create a monopoly of mine labor such as to enable it as an organization to control the coal mining business of the country; and (2) has by express contract joined in a combination and conspiracy with a body of rival operators, resident in other States, to control, restrain, and to an

Statement of the Case.

extent, at least, destroy the coal trade of West Virginia, and by the admission of its officers has spent 14 years' time and hundreds of thousands of dollars in effort to accomplish such purpose.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12; Conspiracy, Cent. Dig. §§ 7–11; Dec. Dig. § 8.]

MONOPOLIES (§ 12)—COMBINATIONS—INTERFERENCE WITH INTERSTATE COMMERCE.—Complainant company commenced the operation of a coal mine in West Virginia with non-union miners. It was shortly notified by officers of the United Mine Workers of America that, unless it unionized its mine, a union mine in Ohio, in which some of its stockholders were interested, would be shut down, and it yielded, its workmen forming a union. A strike was ordered the next day, which was settled. In the next three years three strikes were ordered, and complainant was subjected to a loss thereby of $48,000. At the time of the last, which was a general strike, it offered to comply with the terms demanded, and its employés desired to continue work, but were not permitted. They became dissatisfied, withdrew from the union, and made individual contracts with complainant by which it was agreed that the mine should remain non-union. Defendants, who were officers of the union, undertook to organize another local union at the mine, and threatened to shut it down unless it should be again unionized. Some time previously they had entered into an agreement with operators in other States who were competitors of the West Virginia mines, by which they undertook to unionize the latter, so that they could control conditions and lessen competition. *Held*, that such agreement was unlawful, as in restraint of interstate commerce, and that complainant was entitled to relief by injunction.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

[514] EVIDENCE (§ 253)—SUIT TO RESTRAIN UNLAWFUL COMBINATION—EVIDENCE—DECLARATIONS.—On the question whether a combination is lawful or not, declarations of those engaged in it, explanatory of acts done in furtherance of its objects, are competent evidence after the combination has been proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994–1002; Dec. Dig. § 253.]

In Equity. Suit by the Hitchman Coal & Coke Company against John Mitchell and others. On final hearing. Decree for complainant.

For prior opinion, see 172 Fed. 963.

George R. E. Gilchrist, of Wheeling, W. Va., for plaintiff.

Charles E. Hogg, of Morgantown, W. Va., for defendants.

Opinion of the Court.

DAYTON, District Judge.

On September 21, 1909, I filed a written opinion in this cause, reported in (C. C.) 172 Fed. 963. I there stated the purposes and objects of the bill and the proceedings had thereon and in the cause to that date. I do not, because of the necessary length of this opinion made necessary by the gravity and importance of the questions involved, deem it expedient to reiterate the statement of the case there made, but refer to this prior opinion therefor. Suffice it to say that to my order refusing to modify and in part dissolve the injunction based upon the reasons set forth in that opinion an appeal was taken by the served defendants to the Circuit Court of Appeals for this circuit. That court, on March 11, 1910, dismissed such appeal for want of jurisdiction. 100 C. C. A. 137, 176 Fed. 549. The parties then proceeded to mature the cause for final hearing. The evidence was taken in open court before me. This evidence and the record in bulk is now estimated to be equivalent to between 7,000 and 8,000 pages. Briefs of counsel filed are equivalent to near 800 more such pages, and the learning, research, and legal ability displayed by counsel on both sides in these briefs are such as to command not only the court's gratitude but its highest admiration. The sincere purpose to aid, in every possible way, the true and right determination of the cause on the part of these counsel deserves special commendation.

I have given several months' consideration and study to the questions involved. Because of their importance I have, upon this final hearing, deemed it proper to review, as briefly as possible, the origin of labor unions in England and the legislation and judicial decisions touching their rights, privileges, and obligations in that country, as well as under our Federal and local State laws and judicial decisions.

Without tracing the distinction recognized in England between guilds and combinations of common laborers from which spring substantially the labor unions of to-day, it is sufficient to say that the emancipation of the serfs in the time of Edward III increased largely the number of laborers and

the competition in the labor market, but in the middle of the fourteenth century, when the plague carried off 2,000,000 souls, near half the population of the realm, conditions became reversed—labor became very scarce, food rose in price, and higher wages were [515] demanded by labor. In consequence the Statutes of Laborers were passed in 1349 and 1350, fixing wages absolutely for the summer months, and authorizing the justices of the peace to fix them for the winter ones. These acts further designed to accomplish the other purpose of tying down the liberated serfs who had become laborers to the soil. A laborer was required under pain of imprisonment to remain in his parish, and it was made an offense to refuse to work or to receive or offer higher wages than those fixed by the statutes. These statutes were passed clearly in aid of the agricultural interests of a kingdom with limited resources in that regard, seeking to supply food products for its people. They looked especially to the interest of the consuming public and not to those of the laborer. In the reign of Henry VIII the monasteries were suppressed, and, in consequence, a large number of unemployed persons were turned out to wander over the country. Thereupon the Statute of Apprentices was enacted "in great hope, that being duly executed, it shall banish idleness, advance husbandry, and yield unto the hired, both in the time of scarcity and in the time of plenty, a convenient proportion of wages." This act confirmed the former ones regulating work and wages, and, in addition, fixed the hours of labor, and required the laborer to secure from the master a certificate that he had completed his work for him before seeking work in a new district. These acts fell into desuetude by the beginning of the last century, and State regulation of wages became superseded by contractual relationships between master and servant. The result was that labor, which had before that time opposed State regulation of wages, changed front, and began petitioning Parliament for such regulation and the enforcement of the Apprentice Act. Human nature is the same substantially yesterday, today, and forever. It was very natural that laboring men, seeking to better their condition in life, should a century ago

clamor for the legislative regulation when work was dull and the laborers many, which they had opposed the preceding century when harvests were plenty and laborers few. It is just as natural to-day that from the vast army of laborers engaged in the coal-mining industry, constantly depressed by over production demands, should come for legislative enactment of wage scales minimum at least, and, in the absence of such legislation, efforts on their part should be made by combination to achieve the same result. The question always recurs whether either method can best supersede the natural law of supply and demand. The English courts at the time manifestly thought not, for when organized trade societies, about 1800, instituted actions and sent petitions to Parliament to enforce the Apprentice Act (fixing wages), they held that the act only applied to industries existing at the time of its passage in 1563, thereby rendering it practically ineffective, and, in 1813, Parliament formally repealed it. During these two and a third centuries the Apprentice Act, fixing wages, necessarily forbade labor combinations having for their purpose the securing of wages beyond the limit fixed by the law.

In addition, the common-law doctrine "of restraint of trade" rendered such combinations illegal. In 1797 an act, reaffirmed in 1800, [516] known as the Combination Act, was passed, making unlawful every combination seeking to secure advance of wages, to change or decrease the hours of work, to prevent any employer from hiring anyone he chose, to prevent workmen hiring themselves, to induce workmen to leave their work to attend any meeting called to advance any of these objects, or to spend any money for these purposes.

It is important to pause here, and bear in mind that the three charters granted to Virginia in 1606, 1609, 1611–12, all expressly provided that the laws and ordinances enacted by it should conform to those existing and in force in England; that under its six State constitutions (1776, 1830, 1850, 1864, 1870, and 1902) the fact has always been recognized that the common law of England in force prior to the Revolution was the basic law of the State, save and except so

far as repealed or modified by either constitutional or legislative enactment; that in the first constitution of West Virginia (1861–63) it is enacted:

"Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the legislature." Article 11, § 8.

The same provision was incorporated in the constitution of 1872.

This being true, it is all-important to the correct determination of the questions here involved to determine (*a*) just what the common law was at the time prior to the birth of Virginia as regards these labor organizations; and (*b*) how far that law has been repealed or modified by legislative enactment in Virginia and West Virginia. While there have been very many conflicting decisions in the different States of the Union, it seems to me that the questions are essentially local in character, and must be determined by local law. It is certainly an inherent power of each State to determine for itself how law and order shall be maintained and crime punished. This power necessarily carries with it the right to determine what assemblies meeting within its limits are lawful or unlawful, for what lawful purposes organization may be had, and for what purposes it may be unlawful to organize and operate within its limits. This inherent power in the State can only be superseded by the very limited power of the National Government to interfere provided for by the Federal Constitution. For this reason it seems clear to me that I must determine what constitutes a lawful organization in West Virginia by its laws, and not by either statutes or judicial decisions of other States. What may be lawful in one may be unlawful in another, what may be criminal in one may be permissible in another. In this view of the matter, the subsequent legislation and decisions in England become immaterial, except so far as they may aid us in defining the true principles of the common law existing prior to 1776, and still existing in this State. It will be sufficient to say that the Combina-

Opinion of the Court.

tion Act of 1800 was, in 1825, repealed by the English Parliament, and conspiracy alone became the combination liable to prosecution. For common-law conspiracy a number of the members of trades unions were prosecuted for combining to raise [667] wages and for other of their declared purposes, and convictions were had. In 1856 Crompton declared:

"That all combinations tending directly to impede and interfere with the free course of trade were not only illegal but criminal."

In 1859 Parliament passed an act more closely defining the offense of "molestation and obstruction" used in the act of 1825. It rendered peaceful persuasion to induce workmen to abstain from working, in order to raise their wages, lawful. Was this act necessary because prior to it such persuasion for such purpose under the common law was unlawful? If so, has that common-law rule been abrogated in West Virginia by subsequent legislation? These questions must be considered later. Under this act of 1859, it was held by the Queen's Bench (1867) by Cockburn, C. J.:

"I am very far from saying that the members of a trade union, constituted for the purpose not to work, except under certain conditions, and to support one another in the event of being thrown out of employment, in carrying out the views of the majority would bring themselves within the criminal law, but the rules of the society would certainly operate in restraint of trade, and therefore in that sense be unlawful."

The labor unions thereupon secured the passage of the act of 1871, providing that:

"The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

Was this act secured to repeal another common-law rule existing prior? If so, has such common-law rule been abrogated in West Virginia? If not, could Congress, by virtue of its power to regulate interstate trade, traffic, or commerce, interfere with or prevent this State's enforcement of it as regards intrastate trade? This act of 1871 was the result of the long agitation preceding, which had resulted in the ap-

pointment of a royal commission by Queen Victoria in 1867, and which commission had made 10 preliminary reports, and its final one on March 9, 1869. As a result the Government introduced a bill to legalize trade unions so far as they, being combinations, were in restraint of trade, and, in addition, the bill included certain clauses which made criminal certain acts of theirs. Objection was made by the unions to these criminal provisions. The result of the long agitation that followed was that the bill was cut in two, one being St. 34, 35 Vict. c. 31, known as the Trade Union act of 1871, above referred to, the other the Criminal Law act 1871 (St. 34, 35 Vict. c. 32). By four years of agitation the unions secured the appointment of another royal commission which reported in 1875. Following this report Parliament repealed the Criminal Law Amendment act, 1871 (St. 34, 35 Vict. c. 32), and passed the Criminal Conspiracy and Protection of Property act, 1875 (St. 38, 39 Vict. c. 86), and in 1876 amended the Trade Union act, 1871, by an act known as the Trade Union Act (1871) Amendment act, 1876, and the two together, it was provided, were to be cited as the "Trade Union acts, 1871 and 1876." The "Conspiracy and Protection of Property act, 1875," was amended by an [518] act known as "the Trades Disputes act, 1906," and it was provided that it and the "Trade Union acts 1871 and 1876," together might be cited as the "Trades Union acts 1871 to 1906." These embrace the existing statutory law of England touching labor unions.

The Trade Union act of 1871 provides:

"2. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

"3. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

"4. Nothing in this act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:

"(1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being

Opinion of the Court.

of such trade union shall or shall not sell their goods, transact business, employ, or be employed;

"(2) Any agreement for the payment by any person of any subscription or penalty to a trade union;

"(3) Any agreement for the application of the funds of a trade union—

"(a) To provide benefits to members; or,

"(b) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

"(c) To discharge any fine imposed upon any person by sentence of a court of justice; or,

"(4) Any agreement made between one trade union and another; or

"(5) Any bond to secure the performance of any of the above-mentioned agreements.

"But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.

"5. The following acts, that is to say:

"(1) The friendly societies act, 1855 and 1858, and the acts amending the same;

"(2) The industrial and provident societies act, 1867, and any act amending the same; and

"(3) The companies acts, 1862 and 1867, shall not apply to any trade union, and the registration of any trade union under any of the said acts shall be void, and the deposit of the rules of any trade union made under the friendly societies acts, 1855 and 1858, and the acts amending the same, before the passing of this act, shall cease to be of any effect."

Section 6 then provides that any seven or more members of a trade-union may register such trade-union, "provided that if any one of the purposes of such trade-union be unlawful such registration shall be void." Section 7 authorizes a registered union or any branch of it under the act to purchase and lease land not exceeding one acre in the name of trustees to sell, exchange, and mortgage the same. Section 8 vests all land and personal property of the union or of its branches in the trustees selected therefor and their successors. Section 9 authorizes such trustees to sue and be sued touching the property rights of the union. Section 10 limits personal liability of such trustees to funds actually received by them as such. Section 11 requires the treasurer of the union to render to the trustees accounts of moneys, bonds, or securities received by him at such times as the union rules may prescribe, and, if required, to turn over to

the trustees [519] balances in his hands and all books, papers, and property of the union. Section 12 provides for legal enforcement and criminal punishment of any officer, member, or other person fraudulently obtaining possession of, withholding, or misappropriating funds or property of the union so registered. Section 13 provides the rules of registration to be: (1) By an application with printed copies of the union's rules, and a list of the titles and the names of its officers sent to the registrar who (2) shall become satisfied that the union has complied with the requirements of the act. (3) That no union shall register under a name identical or so nearly the same as to deceive with that of another existing registered union. (4) Where the union has been in operation for more than a year before application made for registration, a general statement of the receipts, funds, effects, and expenditures of such union to be delivered to the registrar. (5) The certificate of registry unless proved to have been withdrawn or canceled to be conclusive that the requirements of the act have been complied with. (6) One of the Secretaries of State to have power to make regulations from time to time touching details of registration, the forms to be used, the inspection of documents kept by the registrar and the fees to be paid for registration. Section 14 provides (1) that the rules of the union shall contain provisions in respect to the several matters mentioned in the first schedule of the act; and (2) that a copy thereof shall be delivered to any person by the union on payment of a sum not exceeding one shilling. Section 15 provides that every registered union shall have a registered office. Section 16 provides that a general statement of the receipts, funds, effects, and expenditures of the union be on the 1st of June of each year transmitted to the registrar, together with any alterations in rules or changes in officers of the union. Section 17: Registrars to report annually to Parliament. Section 18 makes it a misdemeanor to circulate with intent to defraud other than the existing rules of a union. Sections 19, 20, 21, 22, and 23 relate to legal proceedings for the enforcement of the fines and penalties provided for in the act and of definitions of terms used and "the First Schedule" defines six matters to be provided for

Opinion of the Court.

by the union's rules: (1) The name and place of meeting for business; (2) the whole of the union's objects, and the purposes for which its funds shall be applicable, the conditions under which a member may become entitled to benefits, and the fines and forfeitures that may be imposed; (3) the manner of making, altering, amending, or rescinding the rules; (4) a provision for the appointment and removal of a general committee of management, of trustees, treasurers, and other officers; (5) a provision for the investment of the funds and an annual audit of accounts; (6) inspection of the books and roll of membership by every person having an interest in the union's funds. The amendments provided by the act of 1876 do not change these provisions, but enlarge them by (1) allowing unions to pay money on the death of a child under 10 years of age; (2) providing for transfer of union's funds from the estate of a bankrupt trustee to a new trustee; (3) requiring registration by registered unions in all countries where the unions operate; (4) regulating the withdrawal and cancellation of registration certifi[520]cates; (5) allowing one under 21, but over 16 years of age, to become member of a registered union, and providing how funds due him may be paid by the union; (6) providing how a registered union may change its name; (7) that two or more unions may amalgamate and the proceedings necessary thereto; (8) and how a union may dissolve.

The Conspiracy and Protection of Property act, 1875, provides:

"An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.

"Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any act of Parliament.

"Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offense against the State or the Sovereign."

It makes it criminal for (1) an employé of a municipality, alone or in combination with others, to break his contract of employment if he has reasonable cause to believe his doing so will deprive the inhabitants of the place wholly or to a great extent of gas or water; (2) to break a contract of hiring when there is reasonable cause to believe the doing so will endanger life, cause serious bodily injury, or expose valuable property, real or personal, to destruction or serious injury, for a master legally bound to furnish his servant with food and clothing to fail to do so where such failure is likely to impair seriously the health of the servant. It then provides:

"Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—

"(1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or,

"(2) Persistently follows such other person about from place to place; or,

"(3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,

"(4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,

"(5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labor.

"Attending at or near the house or place where a person resides or works or carries on business or happens to be or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." Repealed by section 2, Trade Disputes act, 1906.

The remainder of its provisions relate to the legal proceedings to be pursued in its enforcement, to definitions of its terms and to its application to Scotland and Ireland.

[521] The Trade Disputes act, 1906, provides:

"1.—The following paragraph shall be added as a new paragraph after the first paragraph of section three of the Conspiracy and Protection of Property act, 1875:

Opinion of the Court.

"'An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.'

"2.—(1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

"(2) Section seven of the Conspiracy and Protection of Property act, 1875, is hereby repealed from 'attending at or near' to the end of the section.

"3. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills.

"4. (1) An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade-union in respect of any tortious act alleged to have been committed by or on behalf of the trade-union, shall not be entertained by any court.

"(2) Nothing in this section shall affect the liability of the trustees of a trade-union to be sued in the events provided for by the Trades-Union act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

In giving this very limited review of the origin and progress of English legislation touching trade-unions, I have not stopped to cite authorities. It will be sufficient for me to say that by aid of counsel I have had before me and have consulted the English works, Greenwood on the Law Relating to Trade-Unions, Chalmers-Hunt on Trade-Unions, Davis' Labour Laws, Wright's Criminal Conspiracies, Webb's History of Trade-Unionism, Schlosser and Smith Clark's Legal Position of Trade-Unions, Webb's Industrial Democracy, 14 Enc. Laws of England, Eleventh and Final Report of the Royal Commissioners (First Commission appointed) 1869, and Second and Final Report of the Commissioners (second appointed) 1875.

It is somewhat difficult to define the exact status of these unions under the involved and confusing legislation existing to-day in England. Their position in the body politic is certainly anomalous. Discussing the Trade-Union act of 1871, Farwell, L. J., in the Taff Vale case (1901) 1 K. B. 170, says:

"A trade-union is neither a corporation, nor an individual, nor a partnership between individuals. It is an association of men which almost invariably owes its legal validity to the Trade-Union acts 1871–76, * * * and the legislature in giving a trade-union the capacity to act by agents, has without incorporating it, given it two of the essential qualities of a corporation."

Provisions are made for registered unions, but the acceptance of such provisions is purely voluntary. These registered unions obtain few privileges that are not enjoyed by those unregistered. It is very [522] doubtful whether class legislation of this character could be enacted and enforced in the United States by reason of constitutional limitations, both Federal and State. It is to be always borne in mind that the power to legislate is supreme and unrestricted in the English Parliament, while always limited here by the written Federal and State Constitutions. However, we are not called upon to pass upon the constitutionality of such legislation for none such exists under Federal statute, or by laws of West Virginia as we shall presently show. However, some limitations in England still exist, under this legislation, upon the acts and proceedings of union organizations, that tend clearly to establish common-law principles existing in this State by which we must be bound. Some of these it seems important to indicate.

First. At least, prior to the last act (1906), which provided by its section 3 that "an act done by a person in *contemplation or furtherance of a trade dispute* shall not be actionable on the ground only that it induces some other person to break a contract," it was clearly unlawful for these unions by their trustees and officers to induce or procure men to break contracts with their employers. This was distinctly held by the House of Lords in 1901 in the case of *Quinn* v. *Leathem* A. C. 495, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week, Rep. 139, 85 L. T. N. S. 269, 17 Times L. R. 749, and

Opinion of the Court.

in *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1905) A. C. 239, 74 L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 21 Times L. R. 441. This latter case, as reported in 1 British Ruling cases, 1, will be found to involve closely a similar condition of fact existing here. The coal company and 73 other plaintiffs brought action against the Miners' Federation, its trustees, officers, and certain members of its executive council for wrongfully and maliciously procuring and inducing its workmen in the mines to break their contracts of service with the plaintiffs. It appeared that the Federation (a registered trade union) fearing that the action of merchants and middlemen would reduce the price of coal, and consequently the rate of wages, ordered a "stop day," obeyed by over 100,000 men who took a holiday, and thereby broke their contracts of service. Subsequently four additional "stop days" were ordered, and the men ceased work in violation of their contracts. It was found this advice to the men on the part of the Federation's council was given without malice. Bigham, J., dismissed the action. The Court of Appeal reversed the judgment, and awarded damages to the plaintiffs. (1903) 2 K. B. 545, 72 L. J. K. B. N. S. 893, 89 L. T. N. S. 393, 19 Times L. R. 708. Upon appeal to the House of Lords, the Court of Appeal was affirmed and the Federation's appeal dismissed; the Earl of Halsbury, L. C., Lord Machaghten, Lord James, and Lord Lindley delivering concurring opinions. Good faith was there held to be no justification; "that to combine to procure a number of persons to break contracts is manifestly unlawful." This ruling is in full accord with our American decisions which sustain the right to an injunction against the officers of a labor union to restrain them from inducing members of such organization to strike in violation of their contracts of employment, or which hold them liable in damages therefor. *Holder v. Cannon Mfg. Co.* (1904) 135 N. C. 392, 47 S. E. 481; *Tubular* [523] *Rivet & Stud Co.* v. *Exeter Boot & Shoe Co.* (1908) 86 C. C. A. 648, 159 Fed. 824; *A. R. Barnes & Co.* v. *Berry* (1907) (C. C.) 156 Fed. 72; *Old Dominion S. S. Co.* v. *McKenna* (1887) (C. C.) 30 Fed. 48; *Thomas* v. *Cincinnati, N. O. & T. P. R. Co.* (1894)

4 Interest. Com. R. 788, 62 Fed. 816; *Thacker Coal & Coke Co.* v. *Burke* (1906) 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885. Attached to the report of this last case in 5 L. R. A. (N. S.) 1091, will be found a very valuable note citing many additional authorities. It would seem clear that section 3 of the English act 1906, above referred to, can only effect the enforcement of this principle in England when a trade dispute is on between the same particular employer and his employés, and therefore that no sanction for the claim for the so-called sympathetic strike can be found in it where the breaking of contracts is involved.

Second. The Conspiracy act 1875, it will be observed, expressly makes criminal all violence and intimidation against any person to prevent him from exercising his legal rights, or against his wife or children, or injury to his property, from persistently following him from place to place, from hiding his tools, clothes, or other property, or from depriving or hindering in the use thereof, from watching or besetting his house or place of business or the approach thereto, or from following such other person with two or more others in a disorderly manner through any street or road. In detail specification of forbidden acts this English statute possibly has gone further than many of our American court decisions have gone as regards what shall be considered as intimidation and violence, nevertheless the general principle is the same, and is fully recognized in this country, as also the right to resort to injunction to stay such violence and intimidation. It is needless to cite the vast number of cases establishing this principle in this country beyond peradventure.

Third. It will be noted what stress is laid by this English legislation upon the rules that may be adopted by the unions. In order for them to have the benefit of registration, these rules must be filed with the registrar. All changes therein must be reported, and they are to be printed and copies furnished on demand of any one upon payment of a nominal fee. The clear purpose of this publicity is that it may be apparent to the public just how far the union is lawful in its organization and designs, and that the courts, when appealed to, may determine the character of the union by an

examination of its rules. As a result, since these acts were passed, the English courts have been called upon to determine by such examination whether several of these organizations were lawful or not. From these decisions can be ascertained some very valuable information as to what penalties and obligations can be enforced by these unions against (a) its own members; (b) against the interests of its members' employers; and (c) against the interests of the public.

In *Chamberlain's Wharf Limited* v. *Smith* (1900) 2 Ch. Div. 605:

"The rules of an association, called the Tea Clearing House, the members of which were dock companies and tea warehouse keepers carrying on the business of warehousing tea in bond, provided (rule 11) that every member should charge on teas the respective rates and adhere to the terms and con[524]ditions specified in a schedule to the rules, and should not be at liberty to depart from them in any way, except that a discount not exceeding 10 per cent might be allowed on the said rates. No other discount, no money gratuities, and no advantages, direct or indirect, should be offered or allowed by any member to any merchant, broker, or other person in connection with any matter or thing in any wise relating to the Tea Clearing House agreement. By rule 14 no subscriber should be entitled to warehouse or deposit tea with, or employ in connection with tea, any dock company or tea warehouse keeper who was not a member of the Clearing House, or to purchase or sample any tea from the warehouse of any non-member. By rule 15 any member breaking or failing to observe any of the rules was to be liable to expulsion by resolution of the committee. The committee passed a resolution expelling the plaintiffs for an alleged breach of the rules, and they brought an action against the members of the committee to restrain them from acting on the resolution, on the ground (inter alia) that the plaintiffs had not had an opportunity of being heard in their defense. Kekewich, J., granted an interlocutory injunction. Held, on appeal, that the association was a 'trade union' within the meaning of section 16 of the Trade Union act Amendment act, 1876; that its objects were illegal independently of the Trade Union act, 1871; and that section 4 of that act prevented the court from directly enforcing the agreement between the members: *Held*, also, that by granting the injunction the court would be directly enforcing the agreement. The injunction was accordingly dissolved."

In *Cullen* v. *Elwin* (1903) 88 L. T. 686:

"Under the rules of the Amalgamated Society of Tailors, it was provided by rule 34, 'Trade Regulations,' that during slack seasons a fair equitable division of trade shall be compulsory in all shops.

That a fair equitable division of trade shall be understood to mean that each man shall get trade to the same value as his fellow man or as near it as possible. In no shop shall the dual system of piece-work and day wage be allowed to exist. No member of this society shall in future be allowed to leave a workshop for the purpose of working outdoors or at home, except by the express permission of his branch committee, such permission only to be granted in case of physical inability to remain in the workshop, and to be in all cases indorsed by a general meeting of the members of the branch. Any member breaking the rules and allowing himself to run out of society and still work for a society shop, the branch shall have full power to deal with the matter as they deem best, subject to rules 32 and 33. That a working week shall not exceed fifty-four hours, each district or town to regulate its own time of starting in the morning and leaving off in the evening, and that no overtime be worked except in cases of necessity. Time lost on one day cannot be made up on the following or any subsequent day. Members infringing this rule shall be dealt with as the branch directs, subject to rules 32 and 33. By rule 32, if a member acted contrary to the interests of the society or its rules, he was to be fined or expelled. Held, that the society was illegal."

This case was heard in King's Bench before Lord Alverstone, C. J., Wills and Channel, JJ., all concurring. It was appealed and affirmed by the Court of Appeal in 1904, *Cullen* v. *Elwin*, 90 L. T. 840, all three of the judges concurring. In his opinion in this case Collins, M. R., says:

"It is possible for societies to frame rules which contain an element of illegality in them without at the same time vitiating the whole sytem. It is possible. It is also possible for them to make rules which are apparently and ostensibly innocuous, and yet may vitiate the whole system, because, rightly understood and considered as a whole, their innocent parts are merely ancillary to that part which is not in point of law deemed to be legal. The question on which side of the line the particular rules of a particular society fall is a question of fact in each case."

[525] Again he says:

"At common law agreements in restraint of trade are bad, and combinations in restraint of trade are illegal. But the Trade-Union acts have to a certain extent, and for certain limited purposes, modified the rigor of the common law."

The case of *Gozney* v. *Bristol, etc., Trade & Provident Society* (1909) 1 K. B. 901, was an appeal from the county court to King's Bench Division, and from there to the

Court of Appeal. The defendant was held to be practically an indemnity company undertaking to pay sick, funeral, and death benfits, and also benfits to members when on strike. The action was brought to recover such benfits not paid. The county court held the society illegal, and the action in consequence not maintainable. This action was reversed by the King's Bench and the reversal approved by the Court of Appeal upon the ground expressed by one of the judges that "this society is just inside the limits of legality," for the reason, as expressed by another of them, that "provisions to encourage or procure a strike may be illegal. Provisions for the assistance of the victims of a strike may be perfectly legal. In these rules I can find no provisions addressed to the procurement or even sanction of a strike." Channell, J., of the King's Bench, in his judgment in this case, says:

"It seems to me that the grounds for suggesting illegality are two: First, there may be illegality in the character of the influence which is exerted, which may amount to unlawful coercion; * * * secondly, that with which I think we have to do in this case, namely, the doctrine as to restraint of trade. Speaking generally, and without pretending to give an exhaustive definition, that doctrine is that it is unlawful to fetter by agreement the freedom of action of any one engaged in trade, as a trader or an employer or a workman, except so far as such fetter is reasonably necessary for the protection of the person seeking to impose such fetter upon others."

Again he says:

"What I think has to be found in order to make the association illegal is that the members agree to submit their own action to the decision of others, and to strike or not as directed. That would certainly make the society unlawful, and probably, also, it would be unlawful if the object is to combine for the purpose of putting pressure on employers, and thereby to fetter their freedom of action."

In his opinion in the case, Fletcher Moulton, L. J., says:

"To answer this question (of legality of the association) it is necessary to examine the purposes for which the defendant society is formed, and the means whereby it proposes to effect those purposes. If either of these be illegal, it may be necessary to examine more closely into the nature of that illegality to see whether it is of such a kind as to taint the whole constitution of the society and make it an illegal society. * * * It follows, therefore, * * * that the question must be decided entirely by an examination of the con-

Opinion of the Court.

tents of the printed book of rules of the society. These rules define its constitution and objects, and set forth the detailed rules adopted by it for carrying out those objects."

The case of *Russell* v. *Amalgamated Society of Carpenters & Joiners* seems to have been a test one, having been appealed to the Court of [526] Appeal, and from there to the House of Lords (1910), 1 K. B. 506, and 81 L. J. K. B. 619. In this case it was held:

"Where the rules of a society combined provisions for the militant purposes of a trade union and provisions for the provident purposes of a friendly society, and it was provided by one of the rules that members of the society might be expelled, with the result that they would forfeit all future benefit from the funds of the society, for non-compliance with the decisions of committees directing the militant operations of the society or for violating the recognized trade rules of the district, held, that the main object of the society was illegal at common law, as being in restraint of trade, and that the rules relating to its provident purposes were so inseparably connected with that object as to be affected by its illegality, and therefore unenforceable; and consequently that an action for moneys alleged to have become payable to a member under those rules was not maintainable."

Vaughan, L. J., of the Court of Appeal, in his opinion says:

"It is not every restraint of trade which will render the provisions of an agreement unlawful, in the sense that it cannot be enforced by action at common law. To have that effect, a restraint of trade must be such as in some way to prejudice the interests of the community. It may do that in a case where the freedom of contract of an individual is restricted to an unreasonable extent by an agreement which he has entered into, or in a case where the area from which employers, not parties to the agreement, can seek to obtain workmen is unreasonably restricted. It may be observed, in passing, that it cannot be said in the latter case, as it can in the former, that the restraint of freedom of trade arises in consequence of the voluntary action of the party whose freedom is restrained; for, in a case where, for instance, the rules of a trade union prohibit their members from working with non-union men, there is a restraint of trade to the prejudice of employers and workmen other than members of the trade union, quite independently of any action of their own."

And again:

"With regard to clause 3, which provides that, where one of the committees of the union therein mentioned considers it to the best

Opinion of the Court.

interest of the members of the union that they should refuse to work with non-union men, they shall be entitled to trade privileges, it appears to me that this clause does involve a restraint of trade inconsistent with the public interest. The same observation seems to me to apply to clause 6, the important words of which are those providing that any members who may be withdrawn from their employment on the instruction of one of the committees of the union therein mentioned shall be entitled to trade privileges. The effect of the rules seems to me to be that the members in question must leave work when they are so withdrawn by the instructions of the committee. Then, again, rule 48, cl. 1, appears to me most material for the purpose of showing that the rules contemplate such a restraint of trade as to render them generally unenforceable in law. (The Lord Justice here read the clause.) In my opinion that clause, in substance, from beginning to end amounts to such a restraint of trade as necessarily to render its provisions unlawful. It trespasses against the principle of freedom of contract. The workman is not to be allowed to take a sub-contract or do piecework, or to work in fixing, using, or finishing work which has been made under conditions which the union may consider unfair, and, if he does so, he is liable to be expelled from the union. From every point of view this clause is, in my opinion, of such a character that it must of necessity tend seriously to hamper and restrain trade."

Kennedy, L. J., in his opinion in the case, says:

"The only question before us now is, therefore, as I have said, whether this society is an illegal society at common law. In dealing with that ques[527]tion I will not refer to the rules of the defendant society in detail, as they have been already fully dealt with by the other members of the court. Speaking generally, what seems to me to be the vice of these rules is that they provide for a restraint of trade, not shown to be reasonable, in that they involve a surrender by the members of the union of their individual freedom of action; for they provide that a member may be expelled from the society, under rule 48, cl. 1, with the result that he will forfeit all future benefits, unless he renders passive, or, if required, active, obedience to the decrees of certain bodies constituted within the union under the rules."

In his opinion in the House of Lords, Lord Macnaghten, in this case, says:

"The only question, therefore, seems to be this: Is this trade union, apart from the act of 1871, a lawful association? The answer must depend on a consideration of its purposes as manifested in its rules. It is not every restraint of trade that is unlawful. But I cannot doubt that restraint of trade which is unreasonable, oppressive, and destructive of individual liberty is unlawful. And I cannot help

agreeing with the learned judges of the Court of Appeal that such is the character of some of the rules of this society; and, further, that, having regard to the constitution of the society, the powers vested in its executive officers, and the blending of its funds for all purposes, it is impossible to separate what is legal from what is not legal."

And in discussing the effect of this Trade Union act, 1871, as supplemented by the act of 1876, Lord Robson says:

"It is to be observed that the act did not go the length of abrogating or altering the general law against restraint of trade. It grafted an exception on it in favor of certain classes of persons, but by section 4 it maintained the principle of the old law even against those persons, to the extent of refusing the assistance of the courts in the direct enforcement of contracts between members of a trade union, when the purposes of the union were in restraint of trade. Had it gone further, and altogether excluded the application of the common-law doctrine in this connection, the courts would have been compelled to give full effect by decree or injunction to contracts whereby workmen had bound themselves not to undertake certain legitimate kinds of work, and to refrain, under certain circumstances, from working at their trade at all, except by leave of their union, no matter what their immediate necessities might be. Such contracts would then be as legal as any other by which a man limits his freedom of action for a definite time or purpose, and the prospect of the burden which would thus be cast upon the executive of actively enforcing great numbers of such contracts in periods of industrial hardship or disturbance, was one from which Parliament might well shrink. But the operation of section 4 of the act of 1871 is not confined merely to contracts in restraint of trade. It enacts also that 'nothing in this act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of, (inter alia) '(3) any agreement for the application of the funds of a trade union—(a) To provide benefits to members.' Prima facie the agreements thus excluded from the benefits of the act are legal and meritorious, and their exclusion can only be due to the fact that they rest, in some degree, upon a consideration involving a restraint of trade which the law tolerates, but will not directly assist."

See, also, *Mudd* v. *General Union of Operative Carpenters & Joiners* (1910) 103 L. T. 45, and *Thomas* v. *Portsmouth "A" Branch of the Ship Constructive, etc., Association*, reported in the Times Law Reports May 3, 1912, which are to the same tenor and effect.

I have made this review of the English legislation and decisions in regard thereto to make clear the demonstration of these propositions:

Opinion of the Court.

[528] [1] First. That these union combinations under the law must be considered in their threefold relation: (*a*) To their own members; (*b*) to those who may employ such members; and (*c*) to the public interests.

[2] Second. That in their relations to their respective members they cannot, even under the advanced legislation of England, undertake to require, by oath, obligation, constitution, by-law, or rule, a surrender by such members of their individual freedom of action; that, when they seek to do so, they become illegal, and, while tolerated in England under her Trade-Union acts, nevertheless there, by reason of their illegality, neither can the unions enforce such contracts with their members or members with the unions.

[3] Third. That the question of legality is to be determined from an examination of the union's constitutions, by-laws, or rules as they may be called, and, while some such rules may be lawful, yet, if others unlawful in character are of such weight and importance as to dominate the course of the union's action, or, if the lawful and unlawful ones are so interdependent or intermingled as to render separation one from the other impracticable, then the organization becomes wholly illegal.

[4] Fourth. That in their relations to the employers of their members, while they may use all peaceful efforts to advance their members' interests; in the way of aiding them to secure better wages, shorter hours of labor, and better conditions in which to work, they can not accomplish these ends by any acts of violence, coercion, or intimidation on their part or at their instance. They may not by common law, and in the absence of permissive legislation such as that of the English Act of 1906, interfere with the contracts which their members have entered into, and which are existing between an employer and his employés, nor by any means induce such employés to break such contract or contracts. To break a legal contract is unlawful. Therefore to persuade or induce one to do this unlawful thing is itself unlawful. Further, these unions have no right by intimidation or coercion to destroy the inherent right vested in the employer to control his property, and conduct his business in any law-

ful manner he may choose. Such employer may fix the terms and conditions upon which he will give employment, may employ whom he desires, refuse to employ whom it pleases him to deny employment, may discharge (in absence of contract) whom he pleases, and refuse to discharge whom he pleases. It is entirely within the right of the union to advise its members in the absence of contract on their part with the employer to quit their labor for him, to strike, in other words, and insist upon other and different terms of employment before they return to labor, but neither the union nor its striking members have any right by intimidation or coercion to prevent other laborers or any of the members of the union itself from assuming the employment under the employer's terms if they so desire. They may by reasoning and persuasion under such conditions induce its own members and others not to assume the employment where the breaking of no contract is involved, but this is as far as they can go.

[529] [5] Fifth. The relation of these unions to the public must be considered in dual aspect: (*a*) As to the non-union laboring class seeking competitive work with the union's members; and (*b*) as to the public generally considered as consumer of the labor's product. As regards the first class, it is to be remembered that, while the membership of organized labor is large, the number of non-union laborers in this country and especially in this State is many times greater, and it is the law's function and duty to fully, without fear, favor, or partiality, protect the rights of the latter as well as those of the former. These rights guarantee to the laborer the absolute right to join the unions or not as he sees fit. The unions can not, under the law, use any means of intimidation or coercion to compel him to do so. The limit of their right in this direction is persuasion. If he joins, they can not compel his continuance in membership. He may withdraw when he desires. The union members as individuals may voluntarily determine not to work with non-union labor if they so desire, they can cease working themselves on that account, but they can do nothing in the way of intimidation or coercion to compel either other union men

Opinion of the Court.

or the non-union men to cease working on the one hand or to prevent the employer from filling their places with other union or non-union men on the other. The inherent right of the individual laborer to sell his labor, which is his property, in any lawful manner or pursuit, and upon such terms and conditions as he may himself determine to be for his personal best interests, must be upheld by the law just as fully and freely, regardless of these union organizations as it is upheld in all the other relations of our civic life. As said by Sir William Erle in his "Memorandum on the Law Relating to Trade Unions," filed with the Eleventh and Final Report of the Royal Commissioners 1869:

"As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms, which one person may exercise and declare singly, many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms; but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination. [illegible]"

[illegible]

the absence of special legislation such as that of England (of doubtful constitutionality at least in this country under the written Constitutions, Federal and State, thereof), it is just as unlawful for labor to combine to form a trust or monopoly as it is for capital to do so. The same rule of common law governs the one as the other, and the act of Congress, known as the Sherman Anti-Trust Law, I conceive to be simply declaratory of this principle. The latest construction of this act by the Supreme Court set forth in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and *United States* v. *American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, is that "it prohibits all contracts *and combination* which amount to an unreasonable or undue restraint of trade in interstate commerce." By the English authorities I have hereinbefore cited, it will be perceived that the same doctrine of "unreasonable" restraint of trade has been applied there as against these labor organizations.

Turning our attention to our own country, while it might be interesting to trace the history of these labor combinations in the United States and the decisions of the several States touching their status and rights, it is clearly impracticable to do so within the limits of this opinion. As regards the historical outline, too, it has already been well written in an article on "Trade Unions" in 27 Encyclopædia Britannica (11th Ed. 1911) pp. 150–153. As regards the court decisions of the several States, it is to be always borne in mind that some of the States have enacted legislation touching these organizations differing in character and extent from each other, and that their decisions, based upon and influenced by such legislation, may be found conflicting and confusing as regards each other. For example, New York has passed laws excepting trade unions from restrictions on combinations and conspiracies imposed by other statutes or by the common law; and States like Michigan, Wisconsin, Nebraska, Montana, and North Carolina have laws excepting them especially from the operation of their anti-trust laws. The Texas statute, having a like effect, has been by its Supreme Court declared unconstitutional. See *National Cot-*

Opinion of the Court.

ton Oil Co. v. *Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689.

On June 1, 1898, an act of Congress was approved (chapter 370, 30 Stat, 424 [U. S. Comp. St. 1901, p. 3205]), providing for arbitration of controversies between common carriers in interstate commerce and their employés. The act was permissive, and not mandatory in character, as to whether such arbitration should be submitted to by the parties concerned. Its tenth section, however, provided:

"That any employer subject to the provisions of this act and any officer, agent, or receiver of such employer who shall require any employé, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such a labor corporation, association, [531] or organization; or who shall require any employé or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employé or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employé, attempt or conspire to prevent such employé from obtaining employment, or who shall, after the quitting of an employé, attempt or conspire to prevent such employé from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

This section was held unconstitutional and void in *United States* v. *Scott* (D. C.), 148 Fed. 431; *Order of R. R. Telegraphers* v. *Louisville & N. R. Co.* (C. C.), 148 Fed. 437, and in *Adair* v. *United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764. In this latter case the Supreme Court holds such a provision "to be an invasion of personal liberty, as well as of the right of property, guaranteed by the fifth amendment to the Constitution of the United States." This leaves the act June 20, 1886, c. 567, 24 Stat. 86 (U. S. Comp. St. 1901, p. 3204), 7 Fed. Stat. Ann. 334,

entitled "An act to legalize the incorporation of national trade unions," as our only Federal law in amendment or modification of the common law upon the subject of trade unions. This statute has been construed by Jenkins, Circuit Judge, in *Farmers' Loan & Trust Co.* v. *Northern Pacific R. Co.* (C. C.), 60 Fed. 803. At page 816 he says:

"It was asserted at the argument with great confidence that the act of Congress entitled 'An act to legalize incorporation of national trades unions' (24 Stat. c. 567) had entirely changed the common law. I think the confidence of counsel in the assertion of the proposition was born of zeal, not of judgment. The statute provides for the formation of national trades unions, with power to establish constitution, rules, and by-laws to carry out its lawful objects, and defines the term 'national trade union' to be 'an association of working people having two or more branches in the States or Territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages, and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled, or unemployed members, or the families of deceased members, or for such other object or objects for which workingmen may lawfully combine, having in view their mutual protection or benefit.' The most that can be claimed for this statute is that it removes the common-law disability of combination to raise the price of labor, and to establish the conditions of labor. It contains no suggestion of any right to combine or conspire with a view to injure or oppress or interfere with the rights of others. The organization of labor for the purpose specified in the statute is lawful and commendable, but the statute does not sanction the use of a lawful organization for an unlawful purpose. Nor does it permit such organization to invade the rights of others. Under this act, labor may organize to regulate wages, the hours of labor, and the conditions of labor, and for the protection of individual rights in the presecution of labor; but such lawful organization can not be employed to injure property, or for the oppression of others, or to harm the public welfare. There is nothing in the statute which sanctions that which the law, as above declared, condemns."

[532] It was also construed in *Arthur* v. *Oakes* (C. C. A 7th Cir.), 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414, where Mr. Justice Harlan says:

"Some reference was made in argument to the act of Congress of June 29, 1886, legalizing the incorporation of national trades unions. 24 Stat. 86, c. 567. It is not perceived that this reference is at all

Opinion of the Court.

pertinent to the present discussion. That act does not in any degree sanction illegal combinations. It recognizes the legal character of any association of working people having two or more branches in the States or Territories of the United States, and established 'for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled, or unemployed members or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit.' Associations of that character are authorized to make and establish such constitutions, rules, and by-laws as they deem proper to carry out their lawful objects. Those objects, as defined by Congress, are most praiseworthy, and should be sustained by the courts whenever their power to that end is properly invoked. What we have said about illegal combinations has no reference to such associations, but only to combinations formed with the intent to employ force, intimidation, threats, or other wrongful methods whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seem best."

The only statute of West Virginia relating to these trade unions that could be held to be in amendment or modification of the common law in force in the State is Act Leg. 1907 (Reg. Sess.), c. 78, § 19 (Code Supp. 1909, § 413a1), which reenacted the latter clause of section 413, Code 1906. Code 1899, p. 1053, § 14. This statute has been construed by the Supreme Court of Appeals in *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885, wherein Brannon, J., speaking for the court, says:

"The defendants rely on Code 1899, p. 1053, section 14, reading as follows: 'Nor shall any person or persons or combination of persons, by force, threats, menace, or intimidation of any kind, prevent or attempt to prevent from working in or about any mine any person or persons who have the lawful right to work in or about the same, and who desire so to work; but this provision shall not be so construed as to prevent any two or more persons from associating themselves together under the name of Knights of Labor, or any other name they may desire, for any lawful purpose, or from using moral suasion or lawful argument to induce any one not to work on and about any mine.' This statute is a penal, criminal statute, for

Opinion of the Court.

it makes the acts in it specified unlawful, and by section 17 imposes a punishment. This is a criminal act. It does not pretend to create rights between individuals. It prohibits certain acts, and the proviso simply curtails the scope of the enactment by saying that the enacting clause shall not be construed to impair any right already existing, if existing, to join the organizations therein specified or use moral suasion. It is only a curb upon the enactment. It does not affirmatively grant, create, or originate those rights. It does not make them lawful if before unlawful. And could the legislature authorize any person to violate a contract?"

In *State* v. *Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863, the Supreme Court of Appeals of West Virginia says:

[533] "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void."

And in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, Mr. Justice Lamar, speaking for the court, says:

"Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that comes from such association. By virtue of this right powerful labor unions have been organized. But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution, or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of Government to protect the one against the many, as well as the many against the one."

Further citation of authority would seem to be unnecessary to establish the proposition that under Federal legislation and that of West Virginia the common law is in full force, and that the several propositions I have set forth are the principles of law to govern in the determination of this

case. Before applying these principles to this particular organization and case, I cannot, in view of the extended quotations from labor leaders and advocates contained in the brief of counsel for defendants, but disclaim the sentiment expressed by such leaders, to the effect that either the legislative bodies or the courts of this country, Federal or State, have been or are unfriendly to labor organizations. The contrary is true. The statute books are full of laws for the benefit of labor to better their conditions, to insure their health, safety, and their lives. Organized labor is entitled to all praise for the effective work done in aid of securing these laws. And the courts of the country have been prompt in fully and effectively enforcing such laws.

[6] All labor unions organized for lawful purposes, and striving to achieve those purposes by lawful means and procedure, are entitled to the protection of the law to the fullest extent; but, on the other hand, any and all combinations, labor or otherwise, organized for unlawful purposes, or being lawful in purpose which are prostituted to unlawful proceeding and to the accomplishment of unlawful ends, should be required either to reform their unlawful purposes, cease from their unlawful procedure, or cease to exist. And no part of the body politic is or can be more vitally interested in the suppression of labor organizations unlawful in purpose or proceeding unlawfully than the members of such organizations lawful in purpose and procedure. In determining the character of this International Mine Workers' Union assailed in this case, as disclosed by the near 8,000 pages of evidence, for reasons that will more fully appear hereafter, I purpose to reverse **[534]** the order, and consider first its relation to the general public, and especially to the citizenship of West Virginia. It appears clearly established that in 1898 this organization had a membership of over 30,000, the bulk of which resided in western Pennsylvania, Ohio, Indiana, and Illinois; that in that year they sought and secured a joint conference with an organization of coal operators, the employers of its members, in these States. Such conference was had, and as a result a distinct agreement was entered into. From the stenographic report

(admitted to be correct) of the "Proceedings of Joint Conference of Coal Operators and Coal Miners of Western Pennsylvania, Ohio, and Indiana," subsequently held in Cincinnati, March 8–29, 1910, filed in this cause as "McKinley's Exhibit No. 4," the purport of this Chicago agreement is fully disclosed. In reply to certain propositions presented by the defendant here, Mr. Lewis, then president of the union, Mr. Maurer, of Ohio, read on behalf of the operators a statement, from which I quote:

"The answer of the operators to the proposition of the miners, in order to be thoroughly understood, makes it necessary to recall the history of wage agreements, and trace with brevity the conditions under which we have from time to time met as operators and miners and effected such agreements, so as to show connectedly the factors which have controlled both parties up to the present time.

"In the years prior to any substantial agreement the conditions of the mining industry were very unsatisfactory in their influence upon both the operators of mines and the miners in the various competitive districts. A remedy for this state of chaos was earnestly sought by both parties, and resulted in the early '80's in agreements between the operators and miners of Western Pennsylvania, Ohio, Indiana, and Illinois. In 1886 the institution of contracts between miners and operators was effected. These contracts operated with varying degrees of success and failure for some years and until about the year 1894, when these relations were dissolved. The conditions again took on an aspect of demoralization, which continued with varying degrees of intensity, numerous strikes, lockouts, and consequent loss in wages and profits and sometimes injuries to property, until in the year 1898. During this period the conditions were such, both as to the price received for coal by operators and the price paid to the miners, that it became imperative for the interests of each to reestablish in some form the former agreements. At this time the basing price of the Hocking district was 56 cents per ton for screened lump coal. For a short time immediately preceding that year the mining rate was 51 cents. The working hours in the districts, parties to the early agreements, were from 9½ to 10 hours per day.

"*The chief evil was the fact that districts which did not recognize the United Mine Workers and had no agreements with them produced coal much more cheaply than those districts which sustained contractual relations with that organization. Some of the more important factors influencing these conditions were different methods of producing coal, varying costs of mining, different hours of labor, different sized screens, not mentioning various other elements.*

"In order to correct these most harmful conditions, a joint convention of operators and miners of Western Pennsylvania, Ohio,

Opinion of the Court.

Indiana, and Illinois, at the solicitation of the miners' officials, was called to meet at Chicago in January, 1898. At this convention an interstate joint agreement was established. After a long session of deliberation and negotiation, continuing over a period of about three weeks, the basing price for mining in Ohio and Pennsylvania was increased from 56 to 66 cents per ton, an advance of practically 18 per cent, and both the existing price and method of screening and weighing of coal was made uniform throughout the entire territory covered by the terms of the contract. As a result of the Chicago convention, [535] a representative meeting was subsequently held at Columbus, at which a uniform day wage scale was established for inside labor. All of these concessions made by the operators were of substantial benefit to the miners.

"In addition to the advance in the price of mining and the other important concessions enumerated, the action of this convention had an effect of the most far-reaching and salutary character, not alone for the mine workers, but for the entire labor world, in the recognition of eight hours as constituting a day's labor; this being the first recognition of the eight-hour day by any large body of employers in the United States. *The granting of the eight-hour day by the operators, after making these numerous other important concessions, was with the distinct understanding and explicit promise of the miners to give to the operators of the four contracting States adequate protection against the competition of the unorganized fields. From year to year they have been called upon to fulfill that promise.* The operators, parties to that agreement, at the time of its execution, felt that it was absolutely necessary to the safety of their investments that they be protected from the encroachments upon them by their competitors of the unorganized fields. The tonnage of the non-union fields entering into the competitive market, particularly of West Virginia and Kentucky, at that time was not so large as it was aggressive and threatening, the total tonnage entering directly into competition from those fields being approximately 600,000 tons. Since, however, coal from this unorganized territory coming into direct competition with Ohio and Pennsylvania has so increased that a fair estimate places this competitive tonnage at 8,000,000 tons, which does not include the tonnage from non-union fields adjacent to the Pittsburg district. The markets in western and northern Ohio, eastern Indiana, and Michigan from year to year have been encroached upon by coal from the unorganized districts, until at the present time nearly 50 per cent of the coal consumed in these markets is supplied from fields operated with non-union labor. To find a market for the union tonnage displaced in the territory named, the mine owners of Ohio and Pennsylvania within the past five years have made heavy investments and built and equipped large coal docks to secure the markets at the upper lake ports; but these operators now find the non-union coal rapidly commanding a heavy percentage of this market, when, at the time of the Chicago

agreement, the non-union fields had but a small fraction of this trade, and, unless these conditions are corrected, the markets so secured will soon be replaced by the tonnage from West Virginia and Kentucky. Though in the very heart of the consuming territory, on account of the wide difference between the price of labor in the organized fields of Ohio and Pennsylvania and the unorganized fields of West Virginia, Kentucky, and the fields adjacent to the Pittsburg district, Ohio and western Pennsylvania are rapidly losing the markets at their very doors. It is evident to any candid observer that such unfair conditions should not be imposed upon the operators and miners of the unionized territory. That the interests of operators and miners are mutual in every respect does not admit of controversy. *Each is equally concerned in rescuing this business from its present peril.*

"Finally, we ask for the fulfillment of the pledge of 1898 upon which we made to the miners so many important and costly concessions. Though that promise has not been kept, we have continued for 12 years to make additional concessions by increasing the mining price from 66 cents agreed upon at that time to 90 cents, and in other respects conceding demands without any compensating concessions upon the part of the miners, until we now find ourselves at the limit of financial safety. The operators can make no further concessions. It is now, in our view, not only to the interest of the miners, but their duty as well, to do their share to meet these conditions."

The Chicago agreement and its purposes as set forth by Maurer were substantially admitted. In proof of this I quote from the remarks of Mr. Green, a defendant here, as follows:

"Our friend Mr. Maurer, in the well-prepared statement he has submitted to this convention, referred to an obligation he claims was assumed by the **[536]** United Mine Workers of America in the meeting at Chicago in 1898. Mr. Chairman and gentlemen, we agreed that to a certain extent that was right; but I do not believe it was ever understood that one party to this contract was obligated exclusively to carry out that promise. I believe it was intended to be a mutual understanding, and that both sides would coöperate in trying to organize West Virginia and other non-union districts in order to extend this businesslike basis of adjusting our differences to those fields.

"Let me point to the fact that the United Mine Workers of America have diligently and aggressively attempted to carry out the promise made in Chicago in 1898; that they have done everything in their power to redeem any promise they may have made to organize West Virginia. Since 1898 our organization has at various times spent hundreds of thousands of dollars trying to unionize West Virginia. We have also sacrificed human life in the attempt to redeem that promise. In view of the fact that we have spent hundreds of thou-

Opinion of the Court.

sands of dollars and that our organizers, our members who have gone there as missionaries in an attempt to redeem that promise, have sacrificed their lives and their liberties, we should be given credit for what we have done. I want to ask the operators how much money they have spent and what they have done to aid us to organize West Virginia.

"Is the fact that we have spent hundreds of thousands of dollars appropriated from the small earnings of our people in the central competitive field, and the fact that we have sacrificed the liberty of some of our members, any evidence that we have tried to redeem that promise? Does not that show that we have honestly, sincerely, and diligently attempted to redeem it? I believe, gentlemen, that if the operators had done one-half as much as the miners have done, if they had even coöperated with us in what we have done, West Virginia would be organized and the operators and miners of that State would be here to-day participating in this joint movement."

The "plea in the nature of confession and avoidance" contained in the last paragraph of Mr. Green's argument had been advanced by Mr. Lewis, and was urged by him in these words:

"We want to say, and we say it kindly but positively to the gentlemen on the other side of the house, 'Get together and organize, not only in Ohio and West Virginia'—and I know a lot of you have influence enough over there, if you do as much work as we do, to organize them."

But at the same time it is manifest that he recognized the danger of the public declaration of such purpose, for, prior in the discussion, he had said:

"If I have a proper conception of this movement it means the uplifting of the industry. If I have a proper conception of this movement, it does not mean that either operators or miners can publicly say, 'We will organize West Virginia in order that the miners of Ohio or Indiana can get more work.' That has done more to prevent the organization of West Virginia than anything I know of. Coupled with that is the attitude of Ohio and western Pennsylvania, probably of Indiana, and I know of some Illinois operators who have gone to West Virginia and have built human fences around their properties. I mean by that that they surround their properties with pickets, men who, even when the organizers of the United Mine Workers want to walk along a county or township road passing through the properties is met at the property line and compelled to state what his business is before he can walk on the public highway. Men will say that that is not possible in a free country, but I say it is possible. It is possible

in some mining districts in this country, and I believe they are in the United States, because they are in West Virginia, Kentucky, Tennessee, Alabama, and a few places in Pennsylvania."

[537] I further quote from the remarks of Mr. Feehan of Pennsylvania, another member and representative of the union, as follows:

"We are unwilling that the non-union operators and miners of West Virginia or of any other coal field shall set the standard of prices and the standard of living for the intelligent operators and miners engaged in the mining industry in the States that are represented here. I believe that is the honest opinion of all of the operators who are present. It is unnecessary for me to refer to the fact that many of the operators who are represented here in this joint conference have interests in West Virginia and in other non-union coal fields whose products are going into the markets they are complaining of. It is true that they have contributed, with the other operators who are engaged in the industry in those States and districts, to keep the organization from obtaining a hold or becoming a factor in the industry in those fields of which they complain. If they will withdraw their objections to the establishment of the organization in those fields, I am sure they would not be confronted with those conditions, and we would be able to remove the evil in a very brief time. The practices resorted to by the non-union operators of West Virginia are un-American."

Also from Mr. Maurer's reply:

"We have a condition confronting this convention as grave as confronted the convention that met in Chicago in 1898. We have this great tonnage from the unorganized fields of West Virginia and Kentucky that is absolutely taking away from us our markets, and taking away the employment which belongs to you. It is a condition that not one of us must meet, but that both of us must meet, not only for our protection, but for your protection as well. The cost of living is only incident to it, and the mine-run basis is only incident to it. Every man who swings the pick will agree with me that we can pay no more for mining coal than we can get for the product of your labor. And I am going to put up to you, I am willing to concede to this convention that West Virginia is not organized; that for 10 or 12 long years the miners have done everything in their power to organize that field, and that they did it diligently and earnestly is admitted; nevertheless, that field to-day is unorganized. Nobody is to blame. Neither the operator nor the miner is to blame for that condition; but it is a condition that we must meet and each one bear his share of the burden. Eight million tons of the coal from that unorganized State is to-day taking away from you the product of your

Opinion of the Court.

labor, and taking away from the operator every cent of profit he ever made in the business. You can not correct that. You may say to us, '*You must get together and agree upon prices. You must get the West Virginia operators in and agree upon a price.*' Why, every man who stands here knows that if the operators in the State of Ohio attempt it they do so in violation of the Valentine law, and that the penitentiary stares them in the face. Every miner here knows that, if in the States of Ohio and West Virginia the operators were to attempt anything of the kind, they would violate not only the Valentine law of Ohio, but they would violate the Sherman Anti-Trust Law. It is easy to tell us what to do, but you should also tell us how to do it. Does any miner here believe that the operators of the State of Ohio have not tried to get the best price they can for their commodity? We have some interest in our business, we have our money invested in it, and I assure you that for two years the miners and the railroads have got every cent there was in it, and more, too. However, we stayed in the market. We gave you employment. Now it is up to the miners of this State to meet those conditions and bear their share of that burden. I want to tell you here that if the miners of the State of Ohio insist on an increased price of their coal, they will lose every bit of business they have on the Great Lakes. You have already lost your commercial business. Who supplies Michigan to-day with commercial coal? Who supplies Detroit? Who supplies Toledo? Who supplies Marion? Who supplies Columbus, right in the heart of the Hocking district? Who supplies eastern Indiana? Who supplies all of western Ohio? Tell me, tell me you miners from the [illegible] Hocking Valley, who have seen your mines lay idle while West Virginia coal in trainload lots has gone past your mines! Tell me, you miners in eastern Ohio, who have stood idly by and watched Fairmont coal in trainload lots taking your markets! Ninety per cent of that market is supplied by West Virginia coal from the non-union fields. I say to you the cost of living does not enter into this. I say to you these other elements did not enter into this. I say to you that the best price we can get for our coal under the competitive conditions will not admit of it.

"You miners who mine coal in the State of Ohio, and, if you please, in western Pennsylvania, know that every bit of the trade I refer to was formerly supplied by Ohio and Pennsylvania, even down to the gas business, but it is now supplied by West Virginia."

And from Mr. Lewis' rejoinder:

"Now, the argument is made that we ought to turn our attention to West Virginia, and stop the competition from that State. I admit that argument is good; but, in order for that argument to have strength, it is necessary for the operators at home to stop the kind of guerilla warfare they have among themselves. Mr. Maurer has very well said—and I am glad he has brought the subject up—that we say to

Opinion of the Court.

the operators, 'Get a better price for your coal in order that you can pay us a better price for our labor.' Then he supplements that statement, and very properly, by the statement that, if they were to organize to get a better price for their coal, they would be haled into court under the provisions of the Valentine Law of Ohio and possibly sent to the penitentiary. Probably we would, too. He supplements that statement by asking us to tell them how to get a better price for their coal. I am going to tell you. First, stop making war on the railroads. The poor fellows need help. And this proposition is going to be no joke. I recognize what the mining industry is. I recognize that it is more important than transportation. I recognize that the Valentine Law of the State of Ohio was put on the statute books by a lot of political demagogues who believed they were working in the interests of the dear people—and they did it once for the dear people and about 20 times for themselves. I recognize that this industry does not occupy the plane among the industries of the country that it ought to occupy, because we have met in joint conventions year after year and discussed our wage relations, instead of devoting some of our time to going out and telling certain people to keep their hands off our business. The railroad companies of this country say to the mine owners, 'We want our fuel at a certain rate.' The mine owners, in order to get a part of the fuel trade of the railroads, put down the prices in some instances to cost, not because of competition, but because of your desire to get a part of that trade. Then, after securing a part of that trade, the official representatives of the railroads are in so close touch with the leaders of the manufacturing industries of our country that the steam trade, as we call it, buys fuel almost at as cheap a price as the railroad company. Then, in order to make ends meet, somebody must pay a better price, and it is usually the domestic consumers, the masses of the people. And that is where the political demagogues get their work in, because they are the people who have votes, and that is why they have anti-conspiracy laws placed on the statute books."

Mr. Chapman, of Ohio, an operator, contributed to the discussion some figures as follows:

"It is an admitted fact that there is a difference to-day of between 40 and 50 cents per ton in the cost of production of coal in the union fields of Ohio and the non-union fields of the trade east and south of us in West Virginia, Kentucky, Tennessee, and Alabama, and three of those States, gentlemen, are competitors in the markets of Ohio coal—West Virginia, Kentucky, and Tennessee. The production of West Virginia for 1907 was 40,043,311 gross tons; 44,091,000 being net tons. In 1908 the production was 44,091,000 net tons. In 1909 the production was 44,495,000 net tons. Ohio's pro[**539**]duction for 1907 was 32,365,949 net tons; in 1908, 26,287,800 net tons; and in 1909, 27,756,172 net tons. There are some more interesting statistics connected with

this proposition. The following are the numbers of days the miners worked in West Virginia during the years from 1904 to 1909: 1904, 209; 1905, 213; 1906, 237; 1907, 234; 1908, 211; 1909, 192; making an average of 216 days of 10 hours per day, or a total of 2,160 hours worked each year. Reduced to eight hours per day would be an average of 270 days each year. Ohio worked in 1904, 164 days; 1905, 171; 1906, 175; 1907, 204; 1908, 157; 1909, 165 days, an average for the six years of 173 days, or 97 days less than the average work in West Virginia on the eight-hour basis,"

—and then said:

"Now, gentlemen, it is useless, after the discussions that have taken place here by the gentlemen who preceded me, to discuss at any great length the market that the non-union fields have taken from Ohio in the past. It has been well said that they are putting coal into Columbus, into Michigan, into Detroit, taking the markets that heretofore have been enjoyed by Ohio coal. In the city of Athens, Ohio, which is within three miles of several of the large producing Hocking Valley mines, West Virginia coal is being sold. The gentlemen who are familiar with the situation have informed me that over 2,000 tons of West Virginia coal was sold there between the 1st of September and a short time ago. Even in the town of Logan, one of the points where Hocking Valley gathers its trains to start its coal out to the markets they have, West Virginia coal is taking that market. The gentlemen who were in the Toledo convention and returned on the Hocking Valley train, if they had their eyes open, would have seen full solid trains of Norfolk and Western coal passing up over that road to Toledo. There was not a single car of Hocking Valley coal in the trains. At the town of Bowling Green, 20 miles south of Toledo, when I came through a few weeks ago, I saw every car of coal standing on the side tracks were loaded with West Virginia coal.

"Think of the proposition, gentlemen! Toledo, the central point at which several Ohio coal roads bring everything, and 60 per cent or more of the coal being consumed there is from West Virginia! The Pennsylvania people have a road coming in there, the Wheeling & Lake Erie have a road coming in there, the Toledo & Ohio Central goes in there, the Hocking Valley goes in there, and the D. T. & I. goes in there on a direct line. Now just consider that proposition for a minute, and is it any wonder that Ohio coal operators and interests are in the condition they are to-day with that state of affairs? It was well said by Mr. Lewis and Mr. Penna that people buy their fuel where they can buy it cheapest. I am not through with this proposition. I want to bring you to the city we are now holding this convention in and give you a few figures. In 1897 Pittsburgh shipped by river 1,401,000 tons of coal to the city of Cincinnati. The Kanawha region shipped by river 717,000 tons of coal. The Kanawha

fields shipped by rail 704,000 tons. The other interests from West Virginia, Kentucky, and Tennessee shipped here 275,400 tons. Now we will come to the year 1908.

"Pittsburgh district shipped 535,000 tons to the city of Cincinnati in 1908 as against 10,401,000 (manifestly a mistake—should be 1,401,000) in 1897. Kanawha shipped by river 867,000 tons in 1908 as against 717,000 tons in 1897, and Kanawha shipped by rail in 1908 1,848,000 tons, as against 462,000 in 1897. The Pocahontas district, the Tennessee and Alabama fields shipped in 1908 by rail 1,512,000 tons to the city of Cincinnati as against 275,400 in 1907."

The reasons why West Virginia coals are able to supplant those of Ohio, Western Pennsylvania, Indiana, and Illinois operations in which both sides of this conference were so vitally interested are contributed by both operator and mine representative.

By Mr. Chapman, operator:

"It is not surprising that West Virginia is on a mine-run basis. Why? Because a large per cent of all the fine coal that is produced in that State **[540]** is made into coke. They even crush the lump coal after they produce it to make coke, which is a much more valuable product to them and yields them more returns than the raw coal will. We haven't any of those coals in Ohio or Indiana and they have none of them in western Pennsylvania outside of the coking coal as it is known there."

By Mr. Feehan, mine representative:

"There is one point I want to bring out that has not been made clear, and that is the disadvantage the operators of Eastern Ohio are put to in competing for the markets against the operators who have interests in West Virginia, and that is the character of the veins. In West Virginia it is not an uncommon thing to have them develop from six to ten feet of clean coal. There is no slate to remove. It is easily mined. It is a good grade of coal. It can find a market; and, when you take into consideration the cost of producing a ton of that coal compared with the little five-foot vein of coal in Eastern Ohio with its many impurities and its thick slate, and the Pittsburg district, with its weak roof, where in many cases it is difficult to operate a machine, as well as many other natural disadvantages the operators have, herein lies the cause of the competition more than in the cost of labor. The cost of labor is not the important factor that is crowding the Eastern Ohio operators out of the market on the Lakes or elsewhere. It is the natural disadvantages that is doing it. There is one advantage the operators in Eastern Ohio have, and that is their geographical situation. They are nearer the lake markets and other markets, and I believe they have an advantage of from 15 to 25 cents a ton in freight rates. I understand that,

Opinion of the Court.

when the decision of the Interstate Commerce Commission goes into effect, they will have even greater advantages in freight rates. It is fortunate for them that they have these advantages. Were it not for their advantages in the matter of freight rates, I am positive that many of the veins of coal now being worked in Ohio and elsewhere would be abandoned, and they would wait until the big veins with the greater natural advantages in West Virginia were worked out before they would again operate there. These factors have not been seriously enough considered heretofore."

By Mr. Chapman:

"In 1907 and 1908 the miners earned more money in West Virginia at the prices they were paid there than were earned by Ohio. In fact, they earned from $100 to $150 more to the man. That tells the tale concerning that matter. * * * The coals of West Virginia are said to be mined at about one-half the cost of producing Ohio coals, and the West Virginia product has taken the Ohio markets to the full extent permitted by the difference in transportation expenses, leaving Ohio coals only such markets as may be near the mines, and, as the means of transportation increases by which West Virginia coals are put farther into Ohio markets, the prospect of the Ohio mines is not bright."

I quote further from the remarks of Mr. Savage, of Ohio, one of the defendants here, as follows:

"I was surprised a minute ago to hear that some of the operators were not in sympathy with the men in trying to get a readjustment of their freight rates in Ohio. I know, as one miner, we did all we possibly could in giving testimony before the commission in Columbus, and from what I heard then I believed, and I believe now, that the operators were absolutely right in asking for this readjustment. I believe I can assure you that we will help you in every manner that we can to get that readjustment. But we would ask you, on the other hand, if we are willing to help you—and by helping you we agree we are helping ourselves—if you operators from Ohio and Pennsylvania will lend us the same assistance in West Virginia in getting the mining price up so that competition will not prevail. When we ask that, what do we find? Operators have told me in years past that they were willing to have the miners organized in Ohio, but they were not willing that their [541] miners should be organized in West Virginia. We find as great opposition on the part of the operators from this State who have mines in West Virginia as we find from the operators resident there. If we are going to work along the line of mutual benefit, let us make West Virginia a union State. Go down there and practice what you preach in Ohio. Help us get the protection of the law in that State, and I think we can organize the miners. Instead of helping us, what have you done?

You have done nothing but retard the progress of our organization in that State. The reason they have assigned to me for their attitude was that the caliber of the men employed in the mines of West Virginia was such that, if they were organized, it would be impossible to control them. I believe that a large percentage of those men are as intelligent as we are, and, once they understand the benefits of the organization and the benefits of the contract we enter into, they will observe those contracts as religiously as the miners in Ohio, Pennsylvania, Indiana, or any other State."

And finally from Mr. Zerbe, of Ohio, an operator:

"A very considerable amount of censure and criticism has been put upon some operators who are here because of the fact that they have gone to West Virginia and found investments. I will remind the other side of the house that the men who have gone into Virginia are business men. They are engaged in the coal industry, and they bring the commodity from one State or another to furnish fuel for such contracts as they take. They have found by experience that you as an organized body are not treating them fairly where they are circumscribed in the production of this commodity. They find that you are putting upon them burdens in the organized fields that do not exist in the unorganized fields. By reason of the fact that you cannot control in the production of this commodity, although we are willing to admit you have made an effort, their market is being taken from them or restricted or narrowed, and many of them in self-defense find it necessary, in order to carry out contracts and fulfill their obligations to those who take this commodity from them, to go to West Virginia and invest in properties there that they may continue a business for which they are obligated. * * * We might argue this up one side and down another for a year, and we would be no nearer a solution of this proposition. We are, when we get through, right up against the one proposition we cannot get through, which has been created by the competition brought to bear against us by the operators and the miners of West Virginia in the unorganized field."

It is impossible to deny the conclusions to be drawn from all this. By reason of the natural advantages in the way of superior veins, roofs, and quality, West Virginia coals can be mined for something like 50 per cent less than those of Ohio, Western Pennsylvania, Indiana, and Illinois, and then even her miners can make better wages. The officers and members of this union are almost wholly residents of Ohio, Western Pennsylvania, Indiana, and Illinois. In 1898 as an organization they entered into a direct contract with the operators of that field for and in consideration of an

Opinion of the Court.

eight-hour labor day and other concessions to organize the West Virginia miners, and, by reason of the control they would have under the unions' laws over such miners when so organized, "protect" these operators in Ohio, Western Pennsylvania, Indiana, and Illinois from the existing open competition even then threatening the markets of such operators, especially in the West and the Lake regions. For the purpose of carrying out the agreement, this labor organization has, in the language of the defendant, Green, one of its officers, "at various times spent hundreds of thousands of dollars trying to unionize West Virginia," and "sacrificed [542] human life in the attempt to redeem that promise." Was this in the interest of and for the bettering of mine laborers in West Virginia? It is impossible to see how it could be, for in this conference between the operators and union representatives in March, 1910, as we have shown, direct statistics were given by Mr. Chapman, and not controverted, showing that the West Virginia miners, unorganized, were getting more work and more wages than miners in this unionized field of Ohio, Western Pennsylvania, Indiana, and Illinois. In illustration of this, it seems to me that I may properly refer to conditions as they exist to-day, as disclosed by a public report made to the Governor of the State of West Virginia by a commission appointed by him to investigate and report upon such conditions. The members of this commission were Bishop P. J. Donahue, of the Catholic Diocese of this State; Capt. S. L. Walker, of the States Militia; and F. O. Blue, State Tax Commissioner, men of the highest character and integrity. From this report and current history it appears that the effort to unionize West Virginia still continues, and has more recently been directed to the Paint Creek and Cabin Creek fields in Kanawha County; that such efforts have led to such a condition of riot, bloodshed, and general lawlessness as to require the Governor of the State to twice put the district under martial law to save life and [illegible]. I quote from the report as to the condition of [illegible]

"To this inquiry [illegible] the limiting of the time and [illegible] ... [illegible]

Opinion of the Court.

sonal investigation, supplemented by a great body of formal sworn testimony, sifted, and tested by severe and exhaustive cross-examination, this commission has arrived at the unanimous conclusion that the general surroundings of the miners on Paint Creek and Cabin Creek, respectively, are very good when compared with those of the miners of the few unionized plants on the right bank of the Kanawha and with those of the miners throughout the State and Nation. We have gone into their houses and carefully examined them. They are above the average of miners' homes in most places."

And as to wages:

"A careful consideration of the evidence adduced leads us to the following conclusions: (1) The average annual wage of miners in West Virginia for the years 1905–1911, inclusive, is $554.26. (2) The average annual wage of miners on Paint Creek and Cabin Creek is from $600 to $700. (3) The average wage on Paint Creek and Cabin Creek (non-union) is fully equal to if not greater than that of the miners in the very limited number of unionized plants, in the State on the opposite bank of the Kanawha River. These figures may appear small and inadequate, but, slender as they are, they exceed the average wage obtained in Illinois, a unionized State, which is but $510.86 a year. We have been unable to secure any official figures as to the average annual wage in the unionized States of Indiana, Western Pennsylvania, and Ohio. But we are informed by experts, and we believe, that the average wage in the two States first mentioned probably falls a little below that prevailing in Illinois; while the annual wage in Ohio, owing to local mining conditions, falls a little below those of Western Pennsylvania. This classification, in the order of the rewards of labor, puts West Virginia at the head of the list. If we inquire into these figures more closely, we find they are very substantially affected by several causes, among which comes first the unwillingness of a large number of the miners to work more than four days a week at the most. A minute examination of the pay rolls discloses the fact that 16 or 17 days in the month constitute a high average, and that many engaged in the mines decline to labor more than [548] 12 or 14 days. This is particularly true of some of the native-born miners and many colored men, and results in the necessity of keeping 20 or 30 per cent. more miners in a given operation than would be required if steady application to work were the rule. At several of the mines in the districts under investigation were found men wholly illiterate, and without any special knowledge or skill other than that acquired by their daily experience, earning $4 to $5 and in some cases even $6 a day of eight or nine hours, men with savings bank accounts of $1,000 to $2,600, and others who had purchased out of their savings small farms or other properties adjacent to the mines."

Opinion of the Court.

And as to the causes of the trouble:

"This arises, in our judgment, from the efforts of the United Mine Workers to organize the union in the whole chain of plants along said creeks. Their desire is to make the present strike region the place for the insertion of the thin edge of the wedge of unionism with the ultimate aim of organizing the whole State. The frank declaration on oath of Mr. Thos. Cairns, local president of district No. 17, would appear to put this intention beyond the region of doubt. The United Mine Workers' Association contends that this is essential to the well-being of the 76,000 or more miners of West Virginia. That by this means and this alone can their lot be improved, their rights safeguarded, and the standard of living so raised as to bring it up to a level befitting a citizen, howsoever lowly, of this republic. All classes of people, recognizing the force of the adage 'In union there is strength,' do so organize. Even the operators themselves form associations. 'Why,' say the toilers, 'should we also not unite in lawful combinations?' The operators cannot and do not resist this right as a general proposition, but their claim is that the peculiar industrial conditions in West Virginia would render it ruinous and therefore impossible for them to recognize the union. The geographical position of this State is such, together with the small consumption within her own borders, that of her total coal output of over 60,000,000 of tons she markets barely 10 per cent within her own borders and 90 per cent or more must be hauled to the market through the competing territories of Pennsylvania, Ohio, Indiana, and Illinois, known as the four competitive States; that the operators of said States have always on the floors of joint miners' and mine owners' conventions shown fierce and undisguised hostility to this State, endeavoring in every way to crowd her out of the market and going the length of stating by the mouth of one of Pennsylvania's leading operators that the opening of mines here at all was 'an economic blunder.' Resort has even been had to the Interstate Commerce Commission resulting in reduction of rates to the material advantage of the competitors of West Virginia operators in freight differentials. It has been claimed, too, and with some appearance of probability, that the operators of the said four competitive States are hand and glove with the United Mine Workers in their attempts to unionize West Virginia, so that the representatives of the coal interests of this State must go with their relatively small representation into conventions to regulate conditions and prices, and would come home having rates imposed upon them which, taking into consideration the heavy differentials in railroad hauls, would practically put them out of business and close every mine in the State. They decline, they say, to be wiped out in such fashion. They claim the right to settle their own affairs within the borders of their own State. Even if they come to terms with the district authorities of the United Mine Workers here in West Virginia, these

terms may not be approved at the headquarters at Indianapolis, and all the labored attempts at amicable adjustment may fall through. Further, they claim that the few unionized mines in West Virginia do not and cannot obtain anything like an adequate return on the capital invested. And so, to probe this deplorable situation down to the bedrock of facts, the geographical position of West Virginia is largely responsible for all this industrial strife. Our retarded manufacturing development is also a contributing cause. The consumption of coal within our borders, as elsewhere noted herein, particularly by manufactories, is almost neg[**544**]ligible. No State in the Nation has more inviting natural resources nor offers greater inducements to manufacturing enterprise than West Virginia—great areas of superior coal for steam and coke, splendid timber of many species, almost inexhaustible supply of natural gas, and unlimited water power awaiting to be utilized in the arts of industry. It is impossible not to recognize the merit of, and to sympathize with, many of the contentions on both sides of this unhappy quarrel. Most assuredly each party believes unreservedly in the justice of its claims. It is in the attempted enforcement of them that each has passed the limits of justice, to say nothing of Christian charity and broad humanity. Two facts loom big over the smaller ones developed in this bulk of testimony—the desperate efforts and often unwarranted and unlawful acts of the United Miners to force the union into the disturbed districts, and the equally desperate, unwarranted, and unlawful acts of the operators and their agents to keep the union out. Thus, for months before the actual break, union agitators, many of them strangers, attempted to invade Paint Creek and Cabin Creek to persuade the miners to join the union. They called meetings of the workers, and described to them the hardships and injustice of their lot and the oppression under which they suffered. The wildest theories concerning the rights of property and the means of production were propounded and advocated, and doctrines closely verging upon anarchy were upheld with such effect that men, who before were living peaceably and in comparative prosperity, purchased Winchesters, revolvers, blackjacks, and other murderous weapons to shoot down the coal 'barons' and their myrmidons. Mild-eyed men, 75 per cent of them with usually cool Anglo-Saxon blood in their veins, and with instincts leaning to law and order inherited down through the centuries, gradually saw red, and with minds bent on havoc and slaughter marched from union districts across the river like Hugheston, Cannelton, and Boomer, patroled the woods overhanging the creek bed and the mining plants, finally massing on the ridges at the headwaters, and arranging a march to sweep down Cabin Creek and destroy everything before them to the junction. Meanwhile, the operators hurried in over a hundred guards heavily armed, purchased several deadly machine guns, and many thousands of rounds of ammunition.

Opinion of the Court.

Several murders were perpetrated, and all who could got away. Men, women, and children fled in terror, and many hid in cellars and caves. If ever there was a case for some strong measure like martial law, the conditions prevailing on Monday, September 2, 1912, the eve of the proclamation, presented it. In fact, in the opinion of expert witnesses on the scene, martial law, and martial law alone, was the only measure to meet the desperate situation. We believe, partly on the evidence adduced, and in part from the personal knowledge of two members of the commission who were on the ground, one in active military service, that but for such proclamation taking effect on Tuesday, September 3d, at daylight, there would have been great destruction of property and loss of life in the strike zone. The enormous quantities of Winchesters, revolvers, and other weapons up to machine guns captured from both sides and brought to camp at Paint Creek Junction also bore mute, but eloquent, witness of the height to which the passions of the opposing forces had mounted.

"Now these propositions, trite and fundamental as they are, will assist us to apportion the blame for the strike and the subsequent disorders on Paint Creek and Cabin Creek and the close neighborhood:

"First. Every man has a right to quit his employment and seek other work for any grievance he has or injustice which he may conceive to have been done to him.

"Second. But he has absolutely no right to obstruct, molest, threaten, or otherwise prevent another man from taking the position he has of his own accord abandoned. Organized society and natural law can never yield one jot or tittle on that head. To do so would be to acquiesce in the régime of brute force—a veritable reign of terror.

"Third. Labor has the right to organize for its benefit, protection, increase of wages, and better living conditions, and to have recognition of such organization.

[545] "Fourth. But its organization has no right to coerce by threats or violence anyone to become affiliated with it when he does not desire to do so, nor to assault or put in bodily fear one who desires to labor without belonging to it, nor to destroy property of the employer who does not desire to contract with it, nor to violate its contract with its employer without cause.

"There is abundant evidence before us that a reign of terror was attempted to be organized in the strike district and outside of it. It is true that the officers of the United Mine Workers professed to counsel moderation and a strict observance of law and order on various occasions, but there is testimony tending strongly to show that harangues delivered in public, and of which stenographic reports have been submitted as exhibits, incited the miners to violence

[illegible] der. These harangues were in some in-

stances delivered in the presence of officers of the United Mine Workers' Association, and from platforms upon which they stood and from which they, too, spoke; but the murderous and anarchistic utterances referred to were never disclaimed or disapproved by them either at the time or subsequent to their delivery. Furthermore, there is some evidence tending to show that officers stood by without interfering or protesting while non-union men were brutally beaten. Again, the warning to other miners from outside not to come into the strike region published for many weeks in their local organ and also filed as an exhibit and amounting in effect to a grave threat throws a strong light on the actual situation. We fear that the net result of the action and utterances of those acting and speaking under the apparent sanction and approval of the officers of the United Mine Workers was to foment bitter feeling and to incite to serious breaches of the peace. In all this, even granting that they were not acting against any express law set down in the statute books, yet they were acting against the fundamental principles of right and justice."

These commissioners also examined the mining conditions existing in the Fairmont and Norfolk and Western regions of the State. I cannot extend this opinion by quoting further from it but am justified in saying that they found and report such conditions to be in effect very superior to those obtaining elsewhere in unionized fields, conditions under which men have remained in continuous employment for 15 to 20 years, have saved money and purchased homes and farms, have furnished to them houses comfortable, with electric lights, some with shower baths, good sanitation and water supply, and with wages such as to enable the foreign-born miners in the 44 operations of the Consolidated Coal Company (Fairmont field) to send from $125,000 to $150,000 annually to their dependent relatives in Europe.

All the evidence in this record goes to show pretty conclusively that the 14 years' struggle of this labor organization since it entered into the compact with the operators of Ohio, Western Pennsylvania, Indiana, and Illinois in 1898 to unionize the operations in West Virginia has not been in the interest either of the betterment of mine labor in the State or of upholding that free commerce in coal between the States guaranteed by Federal law, but to restrain and even destroy it in West Virginia for the benefit of these unionized competitive States. It may be unfortunate for

Opinion of the Court.

those States that nature has favored West Virginia, Kentucky, and other Southern States by giving them better coal and less expensive mining conditions, but this does not warrant the operators and miners there to combine and confederate for the purpose of depriving the consuming public of the right to purchase the better coal at the lower cost, if desired. Such a combination is clearly a common-law conspiracy, too far reaching to be reasonable, [546] in restraint of trade, as well, in my judgment, a direct violation of the Sherman Anti-Trust Law. It is further in my judgment a combination or conspiracy against the rights of the many thousands of non-union miners in West Virginia who are entitled to enjoy the advantages in their labor that nature has given them.

But the question at once arises, How could this union carry out this contract with the operators of Ohio, Western Pennsylvania, Indiana, and Illinois to substantially restrain or suppress coal mining in West Virginia, Kentucky, and other States by unionizing them? This brings us squarely to an examination of its constitution, manual, obligations, by-laws, and rules, by which, according to the English decisions, the legality or illegality of such combinations is to be determined. Turning to these, which are in evidence and not denied, we find that, when a miner is initiated into this organization, he is required to take an obligation for life as follows:

"I do sincerely promise, of my own free will, to abide by the laws of this union; to bear true allegiance to, and keep inviolate the principles of the United Mine Workers of America; never to discriminate against a fellow worker on account of creed, color, or nationality; to defend freedom of thought, whether expressed by tongue or pen, to defend on all occasions and to the extent of my ability the members of our organization.

"That I will not reveal to any employer or boss the name of any one a member of our union. That I will assist all members of our organization to obtain the highest wages possible for their work; that I will not accept a brother's job who is idle for advancing the interests of the union or seeking better remuneration for his labor; and, as the mine workers of the entire country are competitors in the labor world, I promise to cease work at any time I am called upon by the organization to do so. And I further promise to help and assist all brothers in adversity, and to have all mine workers join our union

that we may all be able to enjoy the fruits of our labor; that I will never knowingly wrong a brother or see him wronged if I can prevent it.

"To all this I pledge my honor to observe and keep as long as life remains, or until I am absolved by the United Mine Workers of America."

This obligation is required under assurance beforehand that it will require "nothing contrary to your civil or religious duties," yet it does, in fact, require him to alienate for life or until the union absolves him "his freedom to dispose of his own labor or his own capital according to his own will, * * * make himself a slave," contrary to all law, English, American, and common, and in express violation of the Bill of Rights set forth in the Constitution of West Virginia. It binds him never to accept employment in place of a fellow member "idle for advancing the interests of the union or seeking better remuneration for his labor," no matter how anxious he may be to secure work, how well satisfied he might be with the wage offered, and how much he may need the work by reason of a starving family on his hands to support. It further binds him "to cease work at any time I am called upon by the organization to do so," regardless of the dire consequence that may result to him and those dependent upon him. It may well be said that such provisions under the law cannot be enforced. No, not legally, but practically it is different. His refusal to comply with his obligation subjects or may subject him to such social ostracism on the part of his fellow members as to compel [547] obedience. They may taunt him with being without honor or integrity, they may call him "black sheep," "scab," and other opprobrious epithets given new meanings in the English language because of just such conditions arising under the operations of these labor combinations, and they may and do drive him out of work and the community as shown by the facts set forth in many decisions of the courts of this country. But this is immaterial from a legal standpoint, for, as I have shown, the law distinctly bans such obligations as unlawful, and therefore the requiring them on the part of these labor organizations is unlawful. But to further show how complete control the union thus obtains

Opinion of the Court.

and how complete the surrender to such control on the part of the member is, I quote further from the constitution of its national organization as follows:

ARTICLE I.

"SEC. 3. This organization shall be composed of international, district, sub-district, and local unions.

"SEC. 4. The international union shall have jurisdiction over all districts, sub-districts, and local unions, which shall be governed by this constitution."

ARTICLE II.

"SECTION 1. The officers of the union shall be one president, one vice president, one secretary-treasurer, and an executive board to be composed of one member from each district under the jurisdiction of the United Mine Workers, each district to elect its member of the international executive board, the president, vice president, and secretary-treasurer to be members of the board by reason of their position."

ARTICLE IV.

"SEC. 11. The funds of the organization shall be used for the purpose of assisting those who are in need from illness or distress, when the payment of the same has been approved by the international executive board."

ARTICLE VII.—*Cards.*

"SECTION 1. Local unions shall provide each member with a due card, upon which the dues and assessments paid by the member shall be entered, which shall be his receipt for the same.

"SEC. 2. Due cards shall not admit any person to membership from one local to another, and to protect the membership of individuals who are unable to pay their dues because of no local existing where they reside, the international, district, and sub-district secretaries shall, upon the payment of dues and assessments by said member, issue the usual cards for the same; provided that this shall not apply to a member living in a locality where a local union is in existence.

"SEC. 3. No person a member of the organization, who holds a due or transfer card showing him to be a member in good standing, shall be debarred or hindered from obtaining work on account of race, creed, or nationality. Cards properly filled out and signed by the officers of miners' unions in foreign countries shall be accepted in lieu of initiation fees.

"SEC. 4. Any member desiring to leave the mine where his local is located and work elsewhere shall immediately make application to the secretary of the local for a transfer card, and if he has paid all

Opinion of the Court.

dues and assessments, the president and recording secretary shall issue a transfer card to him, which shall be attested by the financial secretary, providing the local union is in good standing with the international, district, and sub-district union, which shall be accepted in any district, and in case such person can not produce a transfer card he shall pay the regular initiation fee. All transfer cards shall be deposited as the laws of the district where work is secured may direct.

[548] "SEC. 5. When a person who has not been a member of the organization three months or more secures a transfer card from a local union in a district where a dispensation has been granted, said transfer card shall not be accepted by any local in a different district from the one in which the local issuing the same is located, unless said transfer card is accompanied by an amount equal to the difference between the initiation fee paid by said member and the initiation fee provided for in the district where the card is deposited.

"SEC. 6. No card shall be issued to any member when the local is three or more months in arrears to the international, district, or subdistrict for dues or assessments. Officers of any local union issuing cards in violation of any section of Article VII shall be fined $10.00 for each card issued, the fine to be collected in the same manner as dues and assessments.

"SEC. 7. The transfer card must show that the member receiving it has paid all dues and assessments for the month in which it was issued, and must also show at what class of labor he was employed.

"SEC. 8. When a transfer card is issued to any member it must be deposited by him with some local union or with the international secretary-treasurer, within three months after the last day of the month in which it was issued to him, else the card will become void and he can only become a member again by initiation as a new member.

"SEC. 9. When a member presents a transfer card to a local union at any mine where he works or desires to work, the local union must accept the same and admit him to membership in that local, unless the local issuing the same is not in good standing, as shown by the monthly report of the secretary-treasurer, or the person to whom the card is issued has not been a member of the organization for three months, as provided for in section 5 of this article, and shall collect from him all dues and assessments from the time between the last day of the month in which the card was issued and the date of depositing the same.

"SEC. 10. The sub-district, district, or international secretary-treasurer shall not accept a transfer card if the member is where he can deposit it with a local union.

"SEC. 11. The international secretary-treasurer shall prepare and send out monthly a statement of all locals three months or more in arrears for dues and assessments, and no local union shall refuse to accept a transfer card from any local unless it appears on said list as being in bad standing. Local unions on strike shall be exempt from the provisions of this section.

Opinion of the Court.

"SEC. 12. All transfer cards shall be made in book form, with two stubs attached. The books to be numbered, and each card in the book to be numbered and bear the number of the book. The stubs to be printed in conformity with the card itself. The card and one stub to be filled out by the recording secretary and certified to by the president and financial secretary of the local union granting the same; one stub to be retained by the local issuing the card for future reference, the other stub to accompany the card and must be immediately filled out by the secretary of the local where the card is deposited and returned by him to the secretary of the local that issued the card.

"SEC. 13. The president, financial and recording secretary of the local union shall keep a record of all transfer cards bought by, issued by, and deposited in their respective local unions. The auditing committee shall compare their records every three months, and in the presence of the local union destroy all transfer cards that have been deposited that there is no dispute about."

"ARTICLE XII.

"SEC. 2. Districts may adopt such laws for their government as they may deem necessary, provided they do not conflict with the international union."

"ARTICLE XIII.

"SEC. 2. Sub-districts may adopt such laws for their government as they may deem necessary, provided they do not conflict with international and district constitutions or agreements entered into.

[549] "SEC. 3. All local unions within the territory of sub-districts already organized in any district shall contribute and become a part of the same and comply with its laws, before they are entitled to password or representation in either international or district organization."

"ARTICLE XIV.

"SECTION 1. Local unions shall be composed of miners, mine laborers, and other workmen, skilled and unskilled, working in and about the mines, except mine manager, top boss, and persons engaged in the sale of intoxicating liquors, and shall be given such numbers as the international secretary-treasurer may assign them.

"SEC. 2. All locals shall be under the jurisdiction of the international, district, and sub-district unions, and may make such laws for their government as they deem necessary, provided they do not conflict with the international, district, and sub-district constitutions or agreements entered into. Any local union or members thereof violating this section shall be subject to a fine of not less than $5.00."

And to further show how this union undertakes to control the freedom of its members to work when and for whom they

please, also its determination to destroy the right of the employer to conduct his own business as he pleases and to discharge and employ whom he pleases, I quote these sections of article 10 of this constitution:

"SECTION 1. When trouble of a local character arises between members of a local union and their employers, the officers of said local shall endeavor to effect an amicable adjustment, and failing in this they shall immediately notify the officers of the district to which the affected locals are attached, and said district officers shall immediately investigate the cause of complaint; and failing to effect a peaceable settlement on a basis that would be fair and just to aggrieved members, finding that a strike would best serve the interests of the locality affected, they may order the inauguration of a strike, but no local strike shall be legalized or supported by a district unless its inauguration was approved by the officers of the district or by the international executive board, upon an appeal taken by the aggrieved members from the decision of the district officers; any local union striking in violation of the above provisions shall not be sustained or recognized by the international officers. * * *

"SEC. 3. When any member of the United Mine Workers is suspended or discharged, it shall be the duty of the mine committee to immediately investigate the case, and if the member discharged is not guilty of an offense justifying the same, the grievance shall immediately be reported to the sub-district and district president in writing, under the seal of the local, and if, upon investigation, the report of the local committee is found correct, the sub-district and district president shall immediately insist upon the reinstatement of the suspended or discharged member.

"SEC. 4. The international officers shall, at any time they deem it to be to the best interests of mine workers in a district that is idle, for just and sufficient reasons, order a suspension in any other district or districts that would in any way impede the settlement of the district affected; provided, that such action would conserve to the best interests of the United Mine Workers of America."

I also quote the following from the constitution of district No. 6:

"ARTICLE I.

"SECTION 1. This organization shall be known as District No. 6, of the United Mine Workers of America.

"SEC. 2. One of the objects of this organization is to unite all employés in and around the coal mines of Ohio and the Pan Handle district of West Virginia."

Opinion of the Court.

"ARTICLE VIII.

[550] "SECTION 1. In case of trouble arising in any local with the employer it shall be the duty of the local officers to try to effect a settlement; failing in this the grievance shall be presented to the sub-district president in writing, who shall investigate the grievance or dispute and settle, if possible. Should he fail, he shall consult the district president, who shall settle the dispute either by suspending work or such other methods as they may deem best. In case of a direct violation of agreements the sub-district president or local union affected are authorized to order a suspension of work.

"SEC. 2. When it becomes necessary for the district president to close a mine, or when a mine or mines from some other legitimate cause has been forced to close down, said officers may, if they deem it wise, close every other mine in district, or may distribute those idle men into any other mine or mines in the district in which said mine or mines so closed may be situated."

"ARTICLE IX.

"SECTION 1. The initiation fee in district 6 shall be $10.00, and all persons applying for and securing work in the mines who are not practical workers shall pay $10.00 initiation fee. Any person applying for work at any organized mine shall present a United Mine Workers' card. In case said person cannot present such a union card he shall pay the regular initiation fee. * * *"

"SEC. 6. All persons employed as check-weighmen shall be members of the United Mine Workers for a period of six months before they are elected to such position. Notice shall be posted near the weigh sheet at least three days before the election of a check-weighman, and no persons are entitled to vote except those who are assessed to pay him his wages."

"SEC. 12. When a miner's son becomes old enough to work in mine he shall be given the preference over other applicants for work."

"SEC. 15. Any member of our organization working in or around the mine, working on idle days or extra time, in violation of our constitution or agreements, shall be fined $2.50 for each offense. * * *"

"SEC. 17. That a fine of $10.00 in each individual case where it can be proven that a member of the union leaves his district for West Virginia, or any other unfair mines, and remains there one month or more without having deposited his transfer card and returns without giving a satisfactory account of why he has not deposited his transfer card; and the fine to be collected by the local union where he works."

And these from the constitution of sub-district 5 of district 6:

"ARTICLE I.

"SECTION 1. This organization shall be known as sub-district 5 of district 6, United Mine Workers of America.

Opinion of the Court.

"SEC. 2. The object of this organization is to unite the mine employés of Belmont, Jefferson, Tuscarawas, Harrison, and Carroll Counties in Ohio, and that part of Stark County south of Canton, other than the Massillon seam, and Hancock, Brooke, Ohio, and Marshall Counties of West Virginia, to ameliorate their conditions by methods of conciliation, arbitration, or strike.

"SEC. 3. All men are eligible and must be members of the U. M. W. of A. who work in and around the mines."

"ARTICLE IX.

"SEC. 2. That a fine of $10.00 in each case, where it can be proven that a member of our union leaves his district for West Virginia or any other unfair mine, and remains one month or more without depositing a transfer card, and returns without giving a satisfactory account of why he has not deposited his transfer card, and a fine to be collected by the local union where he is working.

"SEC. 3. Any member of our organization working in or around the mine, working on idle days or extra time, in violation of our constitution or agreements, shall be fined $2.50 for each offense."

[551] It very clearly appears from a study of these rules that (*a*) they undertake to require members of the organization to surrender their individual freedom of action; (*b*) to coerce non-union miners to join the union, whether wishing to do so or not for they must be members "who work in and around the mines;" (*c*) to control or rather abrogate and destroy the right of the employer to contract with the men independent of the organization; (*d*) to exclude his right to employ non-union labor if he desires; (*e*) to limit his right, in the absence of contract, to discharge whom he pleases, when he pleases, and for what reason he sees fit; and (*f*) to assume the right on the part of the organization, through its officers to control the employer's business, to shut down his mine by calling out the men in obedience to their obligation whenever it is deemed to the interests of the union, regardless of the employer's interests or the effect that such action may have upon him, as regards loss, damage, and necessary violations, on account thereof, of his existing contracts with others. To such extent in this direction does such assumption of power and control go that it is directly provided that such suspension of operations may be ordered, even though there be no dispute between the employer and the union, but solely because such dispute exists between the union and some

one or more of his rival operators in business in the same district. In all these particulars these provisions violate the law, guaranteeing under our free government the rights of both the labor and capital involved, and, further, the rights of the public consuming the product of such labor and capital. But still further, and what manifestly is of far more vital importance, under the power so assumed by this close and compact organization, and by reason of these obligations and rules enforced by it upon its members, it is more than probable that, if allowed to unionize and control the mining operations in West Virginia, it will be entirely able to fulfill its express contract of 1898 with its co-conspirators, the operators of Ohio, Western Pennsylvania, Indiana, and Illinois, and "protect" them from the competition of West Virginia coals, restore to them their lost markets, and practically destroy the coal mining industry of this State to accomplish which the union has admittedly already spent hundreds of thousands of dollars and sacrificed human life as yet to no avail. It is not to be assumed that, because I have not discussed other of the rules and purposes of this organization, that I have ignored their meritorious and beneficent character; nor that I have not considered the very natural and human instinct inspiring the officers and members of this union, resident in other States and laboring under physical disadvantage in mining conditions, to regard their personal interests as paramount. Most of its officers have testified in open court before me, and have fully convinced me that they are men sincere in the conviction of the integrity of their action, perfectly frank and truthful in their testimony, self-educated, and who have by their own effort rightly acquired the leadership in their life work. So far as I am concerned, the law requires me to consider these rules of the organization, and ascertain whether any of them are unlawful in character. If so, whether the unlawful ones dominate the actions and purposes of the organization, [552] or whether the purposes contemplated by the unlawful ones are so intermingled with those designed by the lawful ones as to render separation impracticable. If such domination of the unlawful prevails, or such separation cannot be made, then,

under the authorities I have cited, the organization becomes unlawful. In view of the undisputed testimony in this case, I am constrained to believe both unlawful conditions exist as to these rules. They go far beyond those held to be unlawful, dominating, and inseparable by the English cases which I have cited. They have permitted the officers of this organization to expend, by their own admission, hundreds of thousands of dollars of the funds derived from members bound by these rules in an unlawful conspiracy to restrain trade upon such a large scale as to involve the whole vast coal mining industry of West Virginia.

[7] The final question arises, How is this plaintiff, the Hitchman Coal Company, affected, and what right has it to complain and appeal for injunctive relief? The evidence establishes these facts: Plaintiff is an operating coal mining company in the West Virginia field. Its mines are situate in what is known as the Pan Handle, just across the Ohio River from Ohio, and this union assumes jurisdiction over this territory incorporating it, with some five counties in Ohio, in sub-district 5 of district 6 of its organization. Plaintiff started operations in 1903 as a non-union mine. At this time a company having some stockholders identical with those of plaintiff, and others not such stockholders of plaintiff, was operating a union mine at Mt. Pleasant, Ohio. The officials of the union notified the plaintiff that, if its mine were not unionized, the Mt. Pleasant mine would be shut down by it. On April 1, 1903, the demand of the union was conceded by plaintiff, and it became a union mine. The next day a strike was called by the union, and plaintiff's men went out and remained out 21 days. This strike cost plaintiff $7,242. Its occasion was a dispute as to the scale price for run of mine coal, and was compromised by the union accepting an advance of about 1½ cents per ton for run of mine coal over what the company had been paying, and much less than had been demanded when the strike was called. The miners resumed work on May 23, 1903, and worked until April 20, 1904, when another strike was called about the run of mine coal; the union officials not being satisfied with the prior year's compromise, and insist-

ing on what was called the average as distinguished from the tonnage basis. The plaintiff yielded, and the average basis was established. This strike lasted until June 15, 1904, 55 days, and cost plaintiff $17,000. On April 1, 1905, the union demanded a return to the tonnage basis, as being more profitable to the miner than the average one. This demand was conceded by plaintiff, and the tonnage basis was resumed. A national strike was called for April 1, 1906. In anticipation of it, plaintiff sought to protect its fuel trade by arranging with the union officials for the men to continue work for that purpose, offering to pay the scale prices demanded by the union. This was at first agreed to upon condition that no commercial and only fuel engine coal should be mined. This permission was later withdrawn, and the men ordered to strike, which they did on April 16, 1906. The [553] men did not want to quit work, and tried to get permission from their union officials to continue loading engine coal, for the reason that, if they were not allowed to do so, the Baltimore & Ohio Railroad Company would haul in non-union coal, and have it loaded into their engines from plaintiff's tipple and bins under the terms of plaintiff's contract with the railroad company. The union was notified, too, by plaintiff that, if the men were called out on strike, the mine would not be run union again. This availed nothing. The strike was called, coal was hauled from an Ohio union mine with which settlement had been made by the union by the railroad, and loaded on its engines over plaintiff's tipple. This strike continued until June 12, 1906, 56 days, and cost the plaintiff $24,500. This national strike was finally settled in July, 1906, by the adoption of the 1903 scale, which plaintiff from the start had offered to pay. But in the meantime the Hitchman miners had been promised benefits by the union which were not paid, and they were incensed because the Ohio coal had been allowed to be hauled and loaded on its engines by the railroad over plaintiff's tipple, and because plaintiff's proposition to pay the 1903 scale had not been accepted. Thereupon a mutual agreement was entered into between plaintiff and these individual miners to the effect that the men should abandon the union,

and the company should operate the mine non-union. This was on June 12, 1906, and the agreement was evidenced by memorandum cards signed by the men, reading as follows:

"I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America and will not become so while an employé of the Hitchman Coal & Coke Company, and that the Hitchman Coal & Coke Company is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time while I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America, or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company I will not make any effort amongst its employés to bring about the unionizing of that mine against the company's wish. I have either read the above, or heard same read."

The men surrendered their charter to the union, and on June 25, 1906, secured a charter from this State as a corporation under the name of the Independent Mine Workers of West Virginia. Prior to April 1, 1903, when the mine ran non-union, the company had no trouble whatever with its men, and since June 12, 1906, when it started non-union again, it has run continually without trouble. During the three years and two months from April, 1903, to June, 1906, when unionized, it had three strikes called that suspended its operation for a total of 162 days, at a total cost or loss of $48,742. In March, 1907, the sub-district convention of the union resolved "to take up the work of organizing every mine in the sub-district as quickly as it can be done." In accord with this resolution, officials of the union, defendants here, called on the plaintiff's management and expressed their desire to reunionize the Hitchman mine. The company's officials declined the suggestion. The mine officials asked that the matter be referred to the company's board of directors. This was done, and the board of directors declined to have anything to do with the union, and [554] so notified its officials. Reports were put in circulation among plaintiff's men to the effect that the mine was going to be unionized and that they had better join the union if they wanted to retain their jobs. Early in September, 1907, the defendant Hughes was sent by the union into the

Pan Handle territory to organize the non-union mines and compel recognition by them of the union. As a result of his work he secured 22 men to join the union and quit work at a mine known as the Glendale, which was owned by the same stockholders and run by the same management as the Hitchman. He also succeeded in organizing the Richland mine in that territory, and, when its operator refused to recognize the union, shut it down. According to his statements, he succeeded in securing enough men at the Hitchman mine to agree to join the union to enable him to unionize it, and was about ready to and intended to shut it down if its management did not recognize the union. Thereupon the plaintiff company applied for and obtained the restraining order and temporary injunction in this cause. It is also established that Hughes and other officers of this union were beforehand fully informed of the contracts existing between plaintiff and its employés. These facts very clearly demonstrate such interest in this plaintiff in the premises as to warrant its appeal for aid from this court of equity. I conclude, therefore, that this organization, known as the United Mine Workers of America, is an unlawful one because (*a*) of its principles as set forth in its constitutions, obligation for membership, and rules which (1) require its members to surrender their individual freedom of action; (2) seeks to require, in practical effect, all mine workers to become members of it whether desirous of doing so or not; (3) seeks to control and restrict, if not destroy, the right of the mine owner to contract with his employés independent of the organization; (4) to exclude his right to employ non-union labor if he desires; (5) to limit his right to discharge, in the absence of contract, whom he pleases, when he pleases, and for any cause or reason that to him seems proper; (6) assumes the right on its part, by and through its officers, to control the mine owner's business by shutting down his mine, calling out his men upon indefinite strike in obedience to their obligation to the union, whether the men desire to quit work or not, whenever the union's officers deem it to be for the best interests of the union, regardless of the rights and interests of the mine owner, and regardless of his

direct loss and damages and such indirect loss and damage as may be incurred by him by reason of the resultant violation of contracts by him with others. *Adair* v. *United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764. I further conclude that it is an unlawful organization because (*b*) of its procedure and practices, in that (1) it seeks to create a monopoly of mine labor such as to enable it, as an organization, to control the coal-mining business of the country; and (2) has by express contract joined in a combination and conspiracy with a body of rival operators, resident in other States, to control, restrain, and, to an extent at least, destroy, the coal trade of the State of West Virginia. It has spent 14 years' time and hundreds of thousands of dollars in effort to accomplish this unlawful purpose. The rules of law relating to the [555] responsibility of individual members concerned in such combination and conspiracy are plain and well defined. Great latitude in establishing conspiracy by the admission of circumstantial evidence is allowed, circumstances tending in slight degree to a determination of the truth are allowed to be proved. *Clune* v. *United States*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269. The acts and declarations of co-conspirators in execution of a conspiracy are evidence against others of their number. Id. "Where two or more are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object and forming a part of the res gestæ, in its execution, may be given in evidence against the others." *American Fur Co.* v. *United States*, 2 Pet. 358, 7 L. Ed. 450.

[8] On the question whether a combination is lawful or not, declarations of those engaged in it, explanatory of acts done in furtherance of its objects, are competent evidence after the combination has been proved. *Wiborg* v. *United States*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; *Lincoln* v. *Claflin*, 7 Wall. 132, 19 L. Ed. 106. See also *Sprinkle* v. *United States*, 141 Fed. 811, 73 C. C. A. 285, decided by the Circuit Court of Appeals for this circuit and *Ellis* v. *Dempsey*, 4 W. Va. 126, where these principles are fully upheld. In the very recent cases (decided June 10,

Opinion of the Court.

1912 (of *Hyde* v. *United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, and *Brown* v. *Elliott*, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136, it is held:

"There may be a constructive presence in a State, distinct from personal presence, by which a crime committed in another State may be consummated and render the person consummating it punishable at that place. Overt acts performed in one district by one of the parties who had conspired in another district * * * give jurisdiction to the court in the district where the overt acts are performed as to all the conspirators. Until a conspirator affirmatively withdraws from a continuing conspiracy, there is conscious offending that prevents the statute from running."

The law just as clearly lays down the rules to determine what is an unreasonable restraint of trade.

"From the principles which underlie all the cases the inference must be necessarily drawn that if there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest." *West Virginia Transportation Co.* v. *Ohio River Pipe Line Co.*, 22 W. Va. 600, 625, 46 Am. Rep. 527.

In deciding the case of *United States* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 158, 85 Fed. 271, 288, 46 L. R. A. 122, Judge Taft said that coal was an article of prime necessity. And in the case of *Pocahontas Coke Co.* v. *Powhatan Coal & Coke Co.*, 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667, it is held that coal is properly classified under the head of necessaries. The case of *Pocahontas Coke Co.* v. *Powhatan Coal & Coke Co.*, supra, also holds:

"A contract, combination, or trust among various producers and sellers of a commodity, the direct and necessary or natural effect of which is to **[556]** restrain competition and control the prices of such commodity, is in unreasonable restraint of trade, and void at common law, because contrary to public policy. In determining whether or not a contract or combination is in unreasonable restraint of trade, the subject matter of the contract or combination, the situation of the parties, and all the circumstances attending the transac-

tion should be considered. In determining whether or not a contract or combination is in unreasonable restraint of trade, it is immaterial whether or not the commodity which is the subject matter of the contract or combination is of prime necessity, if the commodity is an article of legitimate trade or commerce. In determining whether or not a contract is in unreasonable restraint of trade, all the powers of the contract should be considered, and its character determined, not alone by what has been done under it, but by what may be done under it, when all of its powers shall have been fully exercised. It is no defense to the illegality of a contract or combination which is in unreasonable restraint of trade to show that the prices of the commodity which constitutes its subject matter have not been changed, or even that such prices have been lowered. Unreasonable restraint of trade, which is only partial, is illegal. In order that a combination or trust may be in unreasonable restraint of trade, it is not necessary that a complete monopoly be formed. The combination or trust is in unreasonable restraint of trade if it tends to monopoly and is to the injury of the public."

The Supreme Court of the United States has held to the same view of the common law so far as the common law was considered in deciding the case of *Standard Oil Co. of New Jersey et al.* v. *United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and the case of *United States of America* v. *American Tobacco Co. et al.* and *American Tobacco Co. et al.* v. *United States of America* (1911) 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. In *Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, it was held that the Sherman Anti-Trust Act "prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business; and this includes restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade except on conditions that the combination imposes," and that it "makes no distinction between classes. Organizations of farmers and laborers were not exempted from its operation, notwithstanding the efforts which the records of Congress show were made in that direction," and that "a combination of labor organizations and the members thereof, to compel a manufacturer whose goods are almost entirely sold in other States, to unionize his shops and on his refusal so to do to

Opinion of the Court.

boycott his goods and prevent their sale in States other than his own until such time as the resulting damage forces him to comply with their demands," is a "combination in restraint of trade."

I further conclude that this union, in pursuit of its unlawful purposes to secure control and the monopoly of mine labor, and to restrain, suppress, if not destroy, the coal mining industry of West Virginia in the interest of their co-conspirators, rival operators and producers in Ohio, Western Pennsylvania, Illinois, and Indiana competitive fields, have sought and still seek to compel the plaintiff, the Hitchman Coal & Coke Company, to submit to contractual relations with it as an organization relating to the employment of labor and pro [557] duction contrary to the will and wish of said company; that its officers, in pursuance of such unlawful effort to monopolize labor and restrain trade, and with knowledge of the express contracts existing between this plaintiff and its employés, have unlawfully sought to cause the breach of the said contracts on the part of its said employés. It is admitted in the testimony of Lewis, Sullivan, and Savage that, if this injunction is dissolved, such efforts will be repeated. I do not stop now to further consider the law declaring efforts to secure the breach of contracts unlawful. I have fully considered this question in my former opinion in this case to which I now refer.

It therefore necessarily follows that the plaintiff had by reason of the damage and loss it had already incurred and the damage and loss threatened and imminent to it in futuro just right to appeal to this court of equity for injunctive relief; that by reason of its unlawful organization, purposes, and practices as hereinbefore set forth, this organization, combination, or union, as now constituted, is unlawful, and under the law, therefore, has no right to seek plaintiff's employés to become members thereof or to become party to its unlawful purposes and practices.

The injunction will be made perpetual.

Syllabus.

MITCHELL ET AL. *v.* HITCHMAN COAL & COKE CO.[a]

(Circuit Court of Appeals, Fourth Circuit. May 28, 1914.)

[214 Fed. 685.]

TRADE UNIONS (§ 1)—LABOR ORGANIZATIONS—LEGALITY—COMMON-LAW RULE.—The ancient English rule that labor unions were unlawful does not prevail in the United States in view of the changed conditions existing; the rule being now settled that labor may organize for its own protection and to further the interests of the laboring classes, and may strike and persuade and induce others to join them by peaceable means, being only subject to legal restraint by injunction when they resort to unlawful means to cause injury to others to whom they have no relation, contractual or otherwise.[b]

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 1; Dec. Dig. § 1.]

ALIENS (§ 4)—CONSTITUTIONAL LAW (§ 210)—DISABILITIES—EQUAL PROTECTION OF THE LAWS.—So long as the United States permits aliens to immigrate, a large majority of whom are uneducated laborers, it is the duty of the Government to afford them equal protection under our Constitution and the laws pursuant thereto, including the right to combine to improve their condition.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 4; Dec. Dig. § 4; Constitutional Law, Cent. Dig. §§ 679, 680; Dec. Dig. § 210.]

TRADE UNIONS (§ 1)—UNITED MINE WORKERS—LEGALITY OF ORGANIZATION.—Code W. Va. 1906, § 413 (Code 1913, c. 15H, § 28 [sec. 487]), provides that no persons or combination of persons, by force, threats, menaces, or intimidation of any kind, shall prevent or attempt to prevent from working in or about any mine any person or persons who have the lawful right to work about the same and who desire to so work, but this provision shall not be so construed as to prevent persons from associating for any lawful purpose or for using moral suasion or lawful argument to induce any one not to work in or about any mine, and section 2859 (Code 1913, c. 62E, § 1 [sec. 3578]) regulates the use of union labels and prohibits the use thereof on merchandise not the product of union labor. *Held*, that **[686]** the trade union known as the United Mine Workers of America, organized to secure reasonable wages and better working conditions among the mine workers of the United States and by concentrated effort to compel by peaceable means the improvement

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[a] For opinion of District Court (202 Fed. 512), see *ante*, page 523. The case is pending on appeal in the Supreme Court.

Syllabus.

of mining conditions in the United States, is not an unlawful organization or combination, either under the statute or at common law.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 1; Dec. Dig. § 1.]

CONSPIRACY (§ 3) — ELEMENTS — EMPLOYEES — UNIONIZATION — INCREASE OF WAGES.—Since members of a trade union have a lawful right to induce persons employed in the same general business to join the union in order to secure as high wages as possible, compatible with the successful operation of the business, a combination to accomplish such purposes by peaceable and lawful methods, so long as they refrain from resorting to unlawful measures to effectuate the same, does not constitute a conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 3; Dec. Dig. § 3.]

CONSPIRACY (§ 1)—WHAT CONSTITUTES.—A "conspiracy" is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 1-5; Dec. Dig. § 1.

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

CONSPIRACY (§ 19)—EVIDENCE—THREATS.—Threats of an organizer employed to induce mine workers to form a local of the United Mine Workers of America, to unionize the employés of complainant's mine or shut it down, he having no authority to carry the threats into execution, were insufficient to show a conspiracy to compel the unionization of the mine by unlawful means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.]

CONSPIRACY (§ 19)—INTERFERENCE WITH COMPLAINANT'S BUSINESS—UNIONIZATION OF MINE EMPLOYÉS.—Evidence reviewed, and *held* insufficient to establish a conspiracy on the part of officers and representatives of a labor union to unionize the employés of complainant's mine by unlawful means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.]

CONSPIRACY (§ 19)—EMPLOYÉS—UNIONIZATION—EVIDENCE. — Where complainant after a strike had severed all business dealings with the United Mine Workers of America and had established a non-union mine, after which attempts were made to induce complainant's employés to rejoin the union, evidence that, prior to complainant's adoption of the non-union policy, defendants were engaged in a combination or conspiracy and by intimidation, violence, and coercion were trying to prevent complainant from operating its mine, was inadmissible to show the existence of an unlawful conspiracy for the same purpose after the open policy was adopted.

Statement of the Case.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.]

EQUITY (§ 427)—RESTRAINT OF TRADE—ANTI-TRUST LAW—VIOLATION—CONFORMITY TO PLEADINGS.—A decree determining that a labor union was an unlawful combination or conspiracy in restraint of trade in violation of the Sherman Anti-Trust [687] Law (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), could not be sustained where there was no allegation of defendant's violation of such law in the pleadings.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§1001-1014; Dec. Dig. § 427.]

MONOPOLIES (§ 24)—CONSPIRACY IN RESTRAINT OF TRADE—INJUNCTION—RIGHTS OF PRIVATE PERSONS.—A private person cannot obtain an injunction restraining the continuance of an alleged conspiracy or combination in restraint of interstate commerce under the Sherman Anti-Trust Law (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); the injunctive remedy covered by such act being available to the Government only, and the individual being only authorized to sue for and recover threefold damages.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MASTER AND SERVANT (§ 339)—CONTRACT OF EMPLOYMENT—INTERFERENCE BY THIRD PERSON.—Complainant, on employing miners, required them to sign a contract declaring that they were not members of the United Mine Workers of America and would not become so while employés of complainant, which agreed to run its works non-union, and that if at any time during the employment an employé should become connected with the United Mine Workers of America or any affilated organization he agreed to withdraw from the employment of the company, etc. *Held*, that such contract did not bind the employés not to join the union, but only provided for termination of the contract in case they did so; and hence solicitation of such employés and inducements held out to them to join the union, by lawful and persuasive methods not coercive nor intimidating, did not constitute an unlawful interference with such contract of employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1283; Dec. Dig. § 339.]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

Suit by the Hitchman Coal & Coke Company against John Mitchell and others individually to restrain them from attempting to organize complainant's mine workers and to

induce them to join a union known as the United Mine Workers of America. From a decree in favor of complainant granting a permanent injunction (202 Fed. 512) defendants appeal. Reversed, with instructions to dismiss.

See also 172 Fed. 963; 176 Fed. 59, 100 C. C. A. 137

Charles E. Hogg, of Point Pleasant, W. Va. (*Charles J. Hogg*, of Point Pleasant, W. Va., on the brief), for appellants.

Geo. R. E. Gilchrist, of Wheeling, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge.

The plaintiff corporation presented its bill for injunction October 24, 1907, to the Hon. Alston G. Dayton, United States District Judge, in the Circuit Court for the Northern District of West Virginia, against John Mitchell and nine others, alleging itself to be a corporation under the laws of West Virginia, and the defendants to be citizens and residents of several different States other than West Virginia; that nine of said defendants first named are presidents, vice presidents, and secretary-treasurers, [688] respectively, of the United Mine Workers of America and of the International Union United Mine Workers of America, of District No. 6, United Mine Workers of America, and of sub-district 5 of District No. 6, United Mine Workers of America, and the defendant Thomas Hughes, an organizing agent of said organization; that plaintiff is the owner of about 5,000 acres of coal, has a mine and mining plant on the Baltimore & Ohio Railroad, that is mining and shipping a daily output of about 1,400 tons of coal, largely under contracts, between 500 and 600 tons to the railroad for its daily engine fuel, has large contracts for future delivery; that prior to April 1, 1906, it operated its mine by employment of men affiliated with the United Mine Workers of America, but on that day a strike was ordered by the officers of the union, and on April 16, 1906, the men so employed, in obedience to the demands and orders of defendants, went out and ceased to work. It is charged that this

strike was ordered because certain other operators refused to sign the scale demanded by the union, and so far as plaintiff was concerned it was wholly without justification or excuse because it distinctly agreed to pay the scale price and any increased price fixed thereby from April 1, 1906, the date of the strike order, whenever it might be fixed and agreed upon, with which proposition the miners themselves, whose labor was involved, were entirely satisfied; that notwithstanding this, at the instance of defendants, its mine was shut down from April 16 to June 12, 1906, to its great financial loss and embarrassment by reason of its inability to comply with its existing contracts. The bill then sets forth in detail in effect that on the last-named date in order to be able to run said mine it entered into a contract with its men whereby it agreed with them to run its mining operation wholly upon non-union basis, refusing absolutely to employ any union men, and whereby the men on their part agreed not to join or become members of this union and to work for plaintiff as non-union men; that plaintiff has since that time been running its mine under this contract with its men to the entire satisfaction of both, paying its men as high wages as paid in any of the union mines. It then charges the officers and agents of the union, with full knowledge of the existence of this contract, to have repeatedly sought to have plaintiff violate it and agree to reunionize its mine, which plaintiff has refused to do, whereupon such union officers and agents are seeking by inducements, threats, and intimidation to induce plaintiff's employés, bound by said contract with it, to leave its service, break their contract, join the union, and also to prevent other men from engaging in its employ, and this, it is charged, with the unlawful purpose to prevent any but union men to work in its mine, compel it to employ none but union men, and to submit its business and its property to the jurisdiction and control of said union and its officers. The bill then proceeds to charge the United Mine Workers of America and its subordinate organizations to be unincorporated organizations, having unlawful purposes and designs to create a monopoly and trust in coal-mining labor, and in support of these allegations sets forth in extenso

Opinion of the Court.

what purports to be excerpts from the constitutions and by-laws of the supreme and subordinate unions, together with the obligation required to be taken by its members and ex- [689] tracts from the proceedings of its national conventions. A distinct conspiracy on the part of defendants as individuals is charged to secure, by reason of their positions, as officers of this union, the abandonment by the men of their contract with plaintiff, their joining the union, the inability of plaintiff to employ others, and the entire shutting down of its mine to its irreparable loss and injury.

The answer contains a general denial, which is substantially as follows:

That the United Mine Workers of America and its subordinate associations or branches, by its officers, agents, employés, and servants, have sought and are seeking by inducements, threats, and intimidation, but without physical force, "to cause plaintiff's employés to leave its service and to cause others who have engaged to enter its service to break their engagements of service and not to work for plaintiff, and to prevent others from working for plaintiff, and all with the avowed and actual purpose of compelling plaintiff to recognize said organization, and to force plaintiff to employ none but persons who are members of the United Mine Workers of America."

They deny that any of the expressed objects of the United Mine Workers of America are unlawful.

They deny that the appellants have entered into a combination or conspiracy under the name of the United Mine Workers of America, unlawfully to persuade, entice, and procure appellee's employés to break, violate, and disregard their several contracts with the appellee, with the avowed purpose of compelling appellee to reunionize its plant without its consent, and deny that they have formed a conspiracy to compel, by threats and intimidation, appellee's employés to join said union.

They deny that Zelenka reported, and caused this report to be circulated among appellee's employés, that Zelenka, Green, and Watkins (appellants), after a conference with appellee's general manager, had agreed with such general manager that appellee's employés were allowed to join the

United Mine Workers of America, and deny that they caused the further statement to be circulated among said employés that they must join the union or else they would be out of a job at an early day; and deny that they caused to be circulated a statement that only union men would be permitted to work at appellee's mine, and that those of appellee's employés who did not join the union would not be permitted to get a job any place else.

And they deny that the appellants are endeavoring to unionize the appellee's mine, and that they threaten to close down appellee's mine and keep it closed until appellee agrees to sign the scale and employ none but union labor; and they deny that the national organization of the United Mine Workers of America and its district and sub-district organizations are under their constitutions violating either the common or statutory law of the State of West Virginia.

And they deny that the appellants will, unless enjoined, by enticement, persuasion, or coercion, bring about the shutting down of appellee's mine and the ultimate destruction of its business; and deny that they will compel the appellee to recognize the appellants as members of **[690]** said labor organization, and will compel appellee to contract with its employés through appellants as officers of said organization; and they deny that they are about to indulge in any of the methods of accomplishing their purpose by the use of threats, intimidation, and other unlawful means alleged in said bill.

Presented with this bill were some 28 affidavits in support of its allegations. A temporary restraining order was granted until the next regular term of court to be held at Parkersburg, January 14, 1908, for which date plaintiff's motion for a temporary injunction was set down for hearing. This hearing, on motion of defendants, was continued until May 26, 1908, when plaintiff presented more than 20 additional affidavits and argued its motion for temporary injunction, counsel for defense stating they "did not desire to be heard in opposition to said motion so far as the granting of a temporary injunction at the time was concerned and not consenting but objecting thereto." The temporary in-

junction was on that day granted in exact accord with the terms of the restraining order.

Answers were filed, exceptions entered thereto, motions as to certain unserved defendants to have said bill dismissed as to them were made, and a motion by defendants, disclaiming "any intention of conceding the truth of the allegations of the plaintiff's bill whereby fraud, coercion, and intimidation or violence in any form whatsoever is imputed to them," was made to dissolve the injunction, "on the face of the bill and exhibits," in so far as said injunction restrained said defendants or any of them from the use of argument, reason, and persuasion, to induce the employés of the plaintiff or any of them to become members of the United Mine Workers of America or any of its subordinate branches; so far as it restrained them from interfering or talking to any person or persons in the employment of the plaintiff, or about to enter the employment of the plaintiff, for the purpose of inducing such persons to become members of the United Mine Workers of America or any of its subordinate branches, in a peaceable and law-abiding manner and unaccompanied by intimidation, force, fraud, violence, or coercion; also in so far as it restrained defendants from visiting the homes of plaintiff's employés for the purpose of inducing them by reason, persuasion, and argument, unaccompanied by force, fraud, intimidation, violence, or coercion, to become members of the United Mine Workers of America or any of its subordinate branches; in so far as it restrained defendants from going near the premises of plaintiff for the purpose of talking with or inducing the employés of plaintiff to become members of the United Mine Workers of America; in so far as it restrained from unionizing or attempting to do so plaintiff's mine, if by "unionizing" is meant action on the part of defendants to induce the employés of plaintiff to become members of the United Mine Workers of America by the use of argument, persuasion, and reason unaccompanied by force, violence, coercion, or intimidation; and also in so far as it restrained defendants from interfering with plaintiff's employés if by the term "interfering" is meant that defendants shall be precluded from interviewing and visiting plain-

tiff's em[691]ployés for the purpose of inducing them to become members of the union.

This motion was deferred until further orders from the court, and on the 21st day of September, 1909, the court filed an opinion in which it held, among other things, that the defendants were not entitled to have the injunction modified, and a decree in pursuance thereof was entered on the 6th day of October, 1909, from which an appeal was taken to this court, and same was dismissed for want of jurisdiction. 176 Fed. 549, 100 C. C. A. 137.

On the 23d day of December, 1912, the court filed another opinion, and in pursuance thereof entered a final decree perpetuating the injunction theretofore granted, from which defendants took an appeal to this court.

The final decree entered herein was based upon the assumption that there was a conspiracy on the part of the defendants to unionize the plaintiff's mine without its consent, and to bring about the breaking of the contracts existing between the plaintiff and its employés, as well as to secure the breaking of the contract between appellee and its employés which had thereafter been entered into; also, to induce the employés to leave its service. These acts are inhibited by the injunction.

The injunction inhibits the defendants from combining, conspiring, or attempting to interfere with appellee's employés, so as willfully to bring about the breaking of their contracts of service with the appellee which appellee now has with its employés; from hindering or obstructing any of the business of appellee, its agents, servants, or employés in the discharge of their duties, or in any manner obstructing appellee's business, with the purpose of compelling or inducing, by threats, intimidation, violence, violent or abusive language, or persuasion, any of the employés of the appellee to refuse or fail to perform their duties as such employés; from compelling or inducing or attempting to compel or induce, by threats, intimidation, force, or violence, or abusive or violent language, any of the employés of plaintiff to leave its service, or refuse to perform their duties as such employés; or in such manner to prevent others seeking em-

ployment from accepting employment with the appellee; from entering or establishing a picket or pickets of men on, or patrolling the railroad or street cars passing through or adjacent to, appellee's property, for the purpose of inducing or compelling, by threats, intimidation, violence, violent or abusive language, or persuasion, any employé of plaintiff to fail or refuse to perform his duties, or for the purpose of interfering or talking to any person or persons on said railroad or street cars going to appellee's mine to accept employment with appellee, for the purpose and with the intention of inducing or compelling them, by threats, violence, intimidation, violent or abusive language, or in any manner whatsoever, to refuse or fail to accept service with appellee, from congregating at or near the premises of the appellee, and from picketing or patrolling said premises for the purpose of intimidating appellee's employés, or coercing them by threats, intimidation, violence, abusive or violent language, or preventing them from rendering their service to appellee, and in like manner from inducing or coercing them to leave the employment [692] of appellee, and from in any manner so interfering with appellee in carrying on its business in its usual and ordinary way, and from interfering by threats, intimidation, or violence, or violent and abusive language, with any person or persons who may be employed or seeking employment by appellee, in appellee's mine and works; from either singly, or in combination with others, congregating in and about the approaches to appellee's mine and works for the purpose of picketing or patrolling or guarding the streets or approaches to appellee's mine, for the purpose of intimidating, threatening, or coercing any of appellee's employés from working in its mine or works, or any person seeking employment there from entering into such employment, and from so interfering with said employés in going to and from their daily work in and about the mine and works of appellee; and, finally, from either singly or collectively going to the houses or boarding houses of appellee's employés, or any of them, for the purpose of intimidating or coercing any or all of them to leave the appellee's employment.

It will be observed that the injunction was based upon the finding that the defendants had resorted to the use of force, violence, intimidation, abusive and violent language, and coercion as a means of obtaining membership in the United Mine Workers of America, from the appellee's employés, and also for the purpose of having these employés quit the service of the appellee, or by such means preventing others seeking employment with it from accepting its service as employés.

The appellee will hereinafter be referred to as "plaintiff" and the appellants as "defendants," such being the relative positions the parties occupied in the court below.

The facts are substantially as follows:

The Hitchman Coal & Coke Company was organized under the laws of the State of West Virginia in the year 1901, and began operations at Benwood, Ohio County, W. Va., in the early summer of that year. The opening up of the mine consumed some time, and the actual mining of coal did not commence until in the winter of 1902. At that time, however, the company did not ship any coal. The company began its operations upon a non-union basis; that is, it employed its labor independently of and without relation to the organization known as the United Mine Workers of America.

It appears from the testimony of E. T. Hitchman that, previous to its entering upon the operation of mining coal at Benwood, the Hitchman Company entered into a contract with the Baltimore & Ohio Railroad Company; and during the early part of its operations all the coal mined by the company was delivered upon the engines of the railroad company. The amount mined at first was very small; it practically commenced at nothing and gradually increased until now this mine is a regular coaling station for the railroad company and is its only coaling station in the vicinity of Benwood.

The coal company continued to operate its mine upon a non-union basis until the month of April, 1903, when it entered into a contract with its employés through the officers of the United Mine Workers of America, adopting the scale

of wages demanded by the members of [693] that organization, and agreeing to observe the rules and conditions of employment.

The company operated its mine upon what is known as a "union basis," for three years, or until some time in April, 1906. The first contract or agreement expired in 1904, and was renewed for a period of two years, or until April, 1906. At that time the men refused to work longer, because no agreement could be made between the employés and the company as to the rate of wages and conditions of employment.

About June 21, 1906, after the mine had been shut down and operations suspended for a period of about 50 days, the company resumed operations upon a non-union basis, with the understanding between the officials of the company and its employés that the company would deal with each one of them individually from that time on, and that the men who had formerly been in the employ of the company were informed by its president that each man would have to seek employment for himself, and that the company would have no further relations with the organization known as the United Mine Workers of America.

After resuming operations in June, 1906, it was agreed between the company and its employés that the company's mine would be operated upon a non-union basis. Its board of directors passed a resolution whereby a fixed policy was adopted by the company to employ none but non-union laborers. The agreement of employment between the company and its men was verbal up to January, 1908, but about that time and since the institution of this suit the company issued employment cards, the exact language of which will be hereinafter quoted and referred to.

Thereafter, each and every man who entered the company's employment was required to sign one of the cards in question before being accepted as an employé; and any applicant for employment who refused to sign the card was enied employment.

appears from the testimony of R. J. Cotts, an employé chman Coal & Coke Company, that from and after

June, 1906, up to and including the date of the taking of the testimony herein, the Hitchman Coal & Coke Company continued to operate its mine upon a non-union basis, with an understanding or agreement between it and its employés that the company would employ none but men who were not members of the United Mine Workers of America; and from January 1, 1908, the men on their part agreed that they would not become members of the United Mine Workers of America so long as they continued in the employment of that company.

During all this time, from the early part of 1902 up to the time of the taking of testimony on behalf of the plaintiff in this case, the business of the Hitchman Coal & Coke Company has increased naturally and gradually, from a production and sale of about 17,000 tons of coal in 1902, to a production and sale of more than 281,000 tons for the first eleven months of the year 1910.

In the year 1902, all but 800 tons of the coal produced by the Hitchman Company was sold to the Baltimore & Ohio Railroad Company, and delivered upon its engines at Benwood, W. Va.; while in [694] 1910 more than half of the coal produced was sold in the open market and was designated upon the books of the coal company as "commercial coal" as distinguished from "engine coal"; and nearly all of this "commercial coal" was shipped to ports on the Great Lakes for transportation by vessel to the northwest country, for delivery at ports on Lake Superior.

Witness Cotts further testified that during all these years the prices received by the coal company for both "commercial coal" and "engine coal" would average from 95 cents to $1 a ton; but, during the time of the strike in the anthracite fields during the year 1903, the price for "commercial coal," prior to April 1 of that year was about $3 a ton, and also during this time, at the average price of from 95 cents to $1 a ton, the average profit derived by the coal company from the mining and shipping and selling of coal was 25 cents a ton.

It also appears from the testimony of W. H. Koch, manager of the Hitchman Coal & Coke Company, that during

the summer of 1907 the officials at that time in charge of the affairs of the United Mine Workers of America for the district in which the Hitchman Company's mine is located called upon the officers of the coal company, and discussed with them the renewal of the relations which had theretofore existed between that company and the miner's organization. At each of these meetings, at least one of which was held in the company's office, the officers of the company refused to consider the renewal of their former relations to the union, and the representatives of the United Mine Workers were informed that it was the fixed and determined policy of that company to employ none but miners who were not members of the union, and in September, 1907, about six weeks after the visit of the officials as above stated, Thomas Hughes, a representative of the United Mine Workers, visited Benwood and its vicinity in an attempt to induce the miners employed by the Hitchman and other coal companies operating in that community to become members of the United Mine Workers.

Witness Koch further testified that in his work as organizer, of soliciting and securing miners to become members of the union, Hughes talked to the employés of the Hitchman and other companies upon the streets of Benwood, and, according to Wesley Corns' testimony, visited the men at their homes, and it is shown by E. C. Pickett's testimony that Hughes addressed the men in open meetings and talked with one or more of the officers of the coal company as to the reason why that company refused to employ any but non-union labor.

E. C. Pickett also testified that in an open-air meeting, which was attended by the superintendent of the coal company, Hughes simply argued to the men the advantages to be derived from the membership in the United Mine Workers of America.

It further appears from P[illegible] Pickett's testimony that, as a result of the efforts of [illegible] about 20 or 25 men employed by the Glendale C[illegible] pany, a [illegible] tion, but managed from [illegible] in charge of the ope[illegible]

induced to become members of the United Mine Workers, and the next morning they were discharged by the su- [695] perintendent of the Hitchman Company. This was in the latter part of September or the first of October, 1907.

We fully appreciate the important bearing the questions here presented have upon the welfare of the mine owners, as well as the laboring men, and are not unmindful of the delicate issues raised by the pleadings and proof in this cause.

That it is advisable to secure a just and fair solution of the labor problem by which equal protection to capital and labor may be secured is undoubtedly the wish of every patriotic citizen, regardless of his station in life. That one who toils for his living is justified in employing all lawful methods for the preservation of his right as an American citizen to secure fair remuneration for his services is established by the Federal and the State courts. That such a person also has the right to join with others similarly situated, in order to promote their welfare as a class, is also established as the law of this country. But while this is so, it is equally well settled that the mine owner is entitled to the full protection of the law in the conduct of his business and the enjoyment of his property.

It is insisted by counsel that the defendants as members of the organization known as the United Mine Workers of America have been within their rights as to the transactions referred to in the bill, and that they have not resorted to intimidation, violence, or other unlawful methods, but, on the other hand, have been actuated solely by a desire to promote the general welfare of those who are employed as laborers in the various coal mines of the country, and that they have not at any time attempted to unionize plaintiff's mine as alleged in the bill.

The plaintiff insists that it has the right to employ only non-union labor, and that the conduct of the defendants in attempting to unionize this class of labor in the State of West Virginia is unlawful in that it is a violation of the constitution, the common law, and the statute law of that State.

Opinion of the Court.

The defendants insist that the policy adopted by the plaintiff is calculated to place those who seek employment of this kind at a great disadvantage; that it will prevent them from accomplishing by united effort that which is essential to the welfare of those whose only asset is their ability to earn a living by manual labor; and that the action of the plaintiff in this instance in making an indirect attack upon their organization is such as to justify this class of laboring men in employing all lawful methods for the purpose of maintaining their organization, the only means by which they can protect their rights and promote their welfare.

It has heretofore been conceded, as a general rule, that a labor union may employ peaceable and persuasive methods for the purpose of keeping its organization intact, and thus enable it to care for those in distress, secure as high wages as possible, and, by united effort, secure the enactment of laws requiring the proper equipment of mines so as to render them safe and sanitary, and to do other things calculated to improve the conditions under which they labor, but the decree in this instance somewhat modifies this rule.

[696] The most important and far-reaching question is raised by the assignment of error wherein it is insisted that the court below erred in holding that the United Mine Workers of America and its subordinate branches constitute an unlawful organization under the Constitution, the common law, and the statutory law of the State of West Virginia.

The learned judge who granted the injunction in this instance filed a very able and exhaustive opinion ([D. C.] 202 Fed. 512), in which it is held, among other things, that the United Mine Workers of America is an unlawful combination at common law, which he insists is still in full force in that State, and in support thereof cites many English cases.

In disposing of this case the court, among other things, said:

"For common-law conspiracy a number of the members of the trades unions were prosecuted for combining to raise wages and for other of their declared purposes, and convictions were had."

The court further said:

"Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia when this Constitution (referring to the first constitution adopted by the State prior to its admission into the Union) goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature."

Taking this as a basis, the learned judge insists that the common law under which labor organizations have been declared unlawful in England is still in force in West Virginia, and that therefore this organization is unlawful, unless by statutory enactment the common law has been modified or abrogated to such an extent as to allow an organization of this kind to exist in that State.

[1] We do not deem it profitable to enter into an extended discussion of this phase of the question, believing as we do that, while there are decisions at common law by the courts of England in support of the contention that labor unions are unlawful, yet such rule has not prevailed in this country, except in a few of the earlier decisions of our courts. Even in England combinations of this character were only proceeded against, as a general rule, when they were criminal or prohibited by statutory law.

1 Eddy on Combinations, §§ 404, 405, in referring to this question, says:

"There seems to have been no rule of the common law against combinations of workingmen, except where such combinations were either of a criminal character or directly against some statutory provision.

"There are some dicta to the effect that such combinations would be unlawful, and 'some traces may be found in the ancient books of a doctrine that it is criminal for one man, independently of a combination, to oblige another, by bond or otherwise, to abstain from the exercise of his proper craft or employment.' But even such bond has no direct relation to a combination; its legality or illegality rests upon considerations entirely foreign to those which control the validity of a combination.

"It is stated by an eminent authority that no case was ever cited prior to the year 1825, in which any person was convicted for a conspiracy in restraint of trade at common law for having combined with others for the raising of wages."

Opinion of the Court.

[697] The following, from Wright's Criminal Conspiracy, is a note to the text under section 404:

"The text-books, down to at least 1800, appear to be silent as to the existence of any doctrine of the criminality at common law of combinations of masters or workmen. Neither in the earlier editions of Hawkins nor in East does the doctrine in question appear to be stated. So in the edition of Burn's Justice, of 1820, it is not mentioned under the title 'conspiracy,' and under the title 'servants' there are several statements of the statutes against combinations, but there is no reference to common law. The various acts against combinations for controlling masters or workmen which were passed in the eighteenth century (1725, 12 Geo. I, c. 34, extended by 1749, 22 Geo. II, c. 27, § 12; 1799, 39 Geo. III, c. 81; [1800] 39 & 40 Geo. III, c. 106, etc.), commence by declaring or enacting agreements for such purposes theretofore made to be 'illegal, null and void,' which would not have been necessary if they had been thought to be criminal at common law; and they then proceeded by independent enactment to make it punishable in the future to engage in them.

"The result of the whole appears to be that there is not sufficient authority for concluding that before the close of the eighteenth century there was supposed to be any rule of common law that combinations for controlling masters or workmen were criminal, except where the combination was for some purpose punishable under a statute expressly directed against such combinations, or was for conduct punishable independently of combination."

However, assuming it to be true that at the time the common law was incorporated as a part of the law of West Virginia, labor unions formed for the purpose of securing a higher rate of wages were held at common law by the English courts to be a criminal conspiracy, yet we do not consider the same as now binding upon our courts, in view of the changed conditions in this, as well as other, countries, incident to industrial development.

In the case of *Everett Waddey Co. v. Typographical Union*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Ann. Cas. 798, the supreme court of that State said:

"It is now well settled by the decisions of the courts of the United States and of the highest courts of a majority of the States in the Union that labor may organize as capital does for its own protection and to further the interest of the laboring class. They may 'strike' and persuade and induce others to join them, but when they resort to unlawful means to cause injury to others, to whom they have no relation, contractual or otherwise, the limit permit-

ted by law is passed and they may be restrained. *Gray* v. *Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172, and cases there cited; *Murdock* v. *Walker*, 152 Pa. 595, 25 Atl. 492, 34 Am. St. Rep. 678; *Otis Steel Co.* v. *Local Union No. 218*, 110 Fed. [C. C.] 700; *Consol. S. & W. Co.* v. *Murray* [C. C.] 80 Fed. 811; *Union Pac. R. Co.* v. *Reuf* [C. C.] 120 Fed. 102; *Allis-Chalmers Co.* v. *Lodge* [*C. C.*] 111 Fed. 264; *Beck* v. *Railway Union*, 118 Mich. 487, 77 N. W. 13, 42, L. R. A. 407, 74 Am. St. Rep. 421; *Plant* v. *Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Eddy on Comb. vol. 2, §§ 1031, 1035; Beach on Mono. & Indus. Trusts, §§ 98, 100, 102; Tiedeman on St. & Fed. Control of Persons & Property, vol. 1, § 114.

"In many of the States of the Union there are statutes which provide for the incorporation of trades unions and other labor organizations, and in all of them one of the permissible objects of incorporation is declared to be the securement of better terms of employment; while at common law, as interpreted by the English decisions and a few of the earliest decisions of the courts in this country, labor combinations formed for the purpose of controlling the rate of wages were regarded as a criminal conspiracy. But these early decisions of the courts of this country were soon departed from by other cases, notably in Massachusetts, New York, and Pennsylvania, which **[698]** placed labor combinations upon a plane of legal equality with capitalistic combinations, by holding that it was not a criminal conspiracy for workmen to combine for the purpose of enhancing the rate of wages, or for improving, in any other way, their relations with employers."

Also in the case of *Carew* v. *Rutherford*, 106 Mass. 14, 8 Am. Rep. 287, the court in discussing this question said:

"* * * And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions. *Commonwealth* v. *Hunt*, 4 Metc. 111 [38 Am. Dec. 346]; *Boston Glass Manufactory* v. *Binney*, 4 Pick. 425; *Bowen* v. *Matheson*, 14 Allen, 499.

"This freedom of labor and business has not always existed. When our ancestors came here, many branches of labor and business were hampered by legal restrictions created by English statutes; and it was a long time before the community fully understood the importance of freedom in this respect. Some of our early legislation is of this character. One of the colonial acts, entitled 'An act against oppression,' punished by fine and imprisonment such indisposed persons as may take the liberty to oppress and wrong their neighbors by taking excessive wages for their work, or unreasonable prices for merchandises or other necessary commodity as may pass from man to man. Anc. Chart. 172. Another required artificers, or handcraft-

Opinion of the Court.

men meet to labor, to work by the day for their neighbors, in mowing, reaping of corn, and the inning thereof. Id. 210. Another act regulated the price of bread. Id. 752. Some of our town records show that, under the power to make by-laws, the towns fixed the prices of labor, provisions, and several articles of merchandise, as late as the time of the Revolutionary War. But experience and increasing intelligence led to the abolition of all such restrictions, and to the establishment of freedom for all branches of labor and business; and all persons who have been born and educated here, and are obliged to begin life without property, know that freedom to choose their own occupation and to make their own contracts not only elevates their condition, but secures to skill and industry and economy their appropriate advantages."

The growth and development of the common law occurred when property rights were recognized as paramount to personal rights. At that time there was little, if any, concert of action on the part of the laboring people, owing to their helpless condition, due in the main to their ignorance. Their domination by the landowner and capitalist was absolute in most respects, and as a result they were as helpless as those held in slavery before our great war. Under such circumstances, it is no wonder that we have many decisions in the past at common law, as well as the enactment of statutory laws, by virtue of which it was almost a physical impossibility for those who earned their living by honest toil to accomplish, by organized effort, those things necessary to elevate them to a plane where they could assert those rights so essential to their welfare.

The industrial development of the world within the last half century has been such as to render it necessary for the courts to take a broader and more comprehensive view than formerly of questions pertaining to the relation that capital sustains to labor.

The first syllabus in the case of *Powell* v. *Sims*, 5 W. Va. 1, 13 Am. Rep. 629, is in the following language:

"The common law of England is in force in this State only so far as it is in harmony with its institutions, and its principles applicable to the state of the country and the condition of society."

[699] The following cases are to the same effect: *Baylor* v. *Baltimore & Ohio Railroad Co.*, 9 W. Va., 270; *Shively*

v. *Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *Tunstall* v. *Christian*, 80 Va. 1, 56 Am. Rep. 581.

In view of the industrial changes indicated, many great problems are now presented to the courts that were wholly unknown at the time when many of the cases relied upon by plaintiff were decided. It is now recognized by all civilized countries that labor is the basis of all wealth, and without which it is utterly impossible to accomplish anything in the industrial world, and, such being the case, the laboring man is entitled to the fullest protection in the assertion of his right to demand adequate pay for any labor that he may perform.

[2] Foreign immigration is increasing rapidly. Statistics show that over a million foreigners land on our shores annually, a majority of whom, owing to their former environments, are not capable of understanding and appreciating what it means to be an American citizen. A large percentage of this class of workmen are employed as miners. While we have no comment to make as to the advisability of restricting immigration (that being a matter which rests solely with the legislative branch of our Government), yet we cannot shut our eyes to the conditions that exist as a result of this policy. That this class of labor, a vast number of whom are unable to read and write or understand our language, can secure a more substantial recognition of their rights as members of a labor union is undoubtedly true, and so long as these people are among us for the purpose of earning a living and thereby improving their condition, and at the same time adding to the wealth of our country, it is the duty of this Government to afford them equal protection under our Constitution and the laws passed in pursuance thereof. That there is at this time a well-defined struggle between capital and labor, each trying to protect its rights from its own point of view, is a condition and not a theory.

In this connection it is pertinent to consider the purposes of the United Mine Workers of America, which is composed of three branches, to wit, National, District, and Sub-district, all of which were declared to be unlawful by the lower court.

Opinion of the Court.

In the preamble of the national constitution of the organization is to be found a declaration of the purposes for which it was established, which is as follows:

"There is no fact more generally known, or more widely believed, than that without coal there would not have been any such grand achievements, privileges, and blessings as those which characterize the twentieth century civilization, and believing as we do, that those whose lot it is to daily toil in the recesses of the earth, mining and putting out coal which makes these blessings possible, are entitled to a fair and equitable share of the same; therefore we have formed 'The United Mine Workers of America,' for the purpose of the more readily securing the object sought by educating all mine workers in America to realize the necessity of union of action and purpose, in demanding and securing by lawful means the just fruits of our toil. And we hereby declare to the world that our objects are:

"First—To secure an earning fully compatible with the dangers of our calling and the labor performed.

"Second—To establish as speedily as possible, and forever, our right to receive pay, for labor performed, in lawful money, and to rid ourselves of the [700] iniquitous system of spending our money wherever our employers see fit to designate.

"Third—To secure the introduction of any and all well defined and established appliances for the preservation of life, health, and limbs of all mine employés.

"Fourth—To reduce to the lowest possible minimum the awful catastrophes which have been sweeping our fellow craftsmen to untimely graves by the thousands; by securing legislation looking to the most perfect system of ventilation, drainage, etc.

"Fifth—To enforce existing laws; and where none exist, enact and enforce them; calling for a plentiful supply of suitable timber for supporting the roof, pillars, etc., and to have all working places rendered as free from water and impure air and poisonous gases as possible.

"Sixth—To uncompromisingly demand that eight hours shall constitute a day's work, and that not more than eight hours shall be worked in any one day by any mine worker. The very nature of our employment, shut out from the sunlight and pure air, working by the aid of artificial light (in no instance to exceed one candlepower), would in itself, strongly indicate that, of all men, a coal miner has the most righteous claim to an eight-hour day.

"Seventh—To provide for the education of our children by laws prohibiting their employment until they have attained a reasonably satisfactory education, and in every case until they have attained fourteen years of age.

"Eighth—To abrogate all laws which enable coal operators to cheat the miners, and to substitute laws which will enable the miner, under

the protection and majesty of the State, to have his coal properly weighed or measured, as the case may be.

"Ninth—To secure by legislation, weekly payments in lawful money.

"Tenth—To render it impossible, by legislative enactment in every State, for coal operators or corporations to employ Pinkerton detectives or guards, or other forces (except the ordinary forces of the State) to take armed possession of the mines in case of strikes or lockouts.

"Eleventh—To use all honorable means to maintain peace between ourselves and employers; adjusting all differences, so far as possible by arbitration and conciliation, that strikes may become unnecessary."

The constitution of district 6 contains the same declarations of purposes, with the following added:

"Twelfth—And to use all honorable means to elect members of our organization to legislate and enforce laws in State and national legislative assemblies that will bear equally upon all citizens of the United States, its Territories and other dominions.

"And we further declare it to be the purpose of District 6, United Mine Workers of America, to give moral and material aid to all its members in good standing and to those who may be dependent upon them, and to render such assistance as may be possible to all our members socially and financially, and to create a relief fund for members in distress, subject to the discretion of the officers and executive board of District 6, United Mine Workers of America, as hereinafter provided."

The court below in its opinion referred to a number of provisions contained in the constitution and rules of this organization which in its judgment rendered the same unlawful; the first being that a member is required to promise that he will cease to work whenever called upon to do so by the organization.

A careful examination of this provision fails to show on its face anything unlawful, while on the other hand common experience teaches us that a rule of this character is essential for the preservation of labor organizations. Without a provision of this kind, there would be no power of securing concert of action; no means by which united effort [701] could be secured for the accomplishment of the aims and purposes of the organization. In the absence of proof to the contrary, it must be assumed that this power would be exercised wisely, and only when necessary to promote the interest of the organization in a legitimate manner. It would be inconsistent with reason to assume that this

power would be exercised so as to prevent the operation of a mine, which would necessarily defeat the very object for which this organization was established, to wit, the procurement of steady employment at remunerative wages.

The court below was also of the opinion that under the rules of the organization a member could be held as a slave, and thus prevented from exercising his own free will. We fail to find any provision preventing one from ceasing to work at any time he may desire, and, if he should do so, he would no longer be a member of the organization. One could also cease to be a member of the union by failing to pay his dues. Under these circumstances there is no possibility of one's being held as a member of the union contrary to his wishes.

The court below was further of the opinion that the union has the power to cause miners to become members thereof. We fail to find anything in the rules to justify the assumption that the union has an arbitrary power, by violence, intimidation, or otherwise, to compel one to become a member of the organization. While it is alleged in the bill that the United Mine Workers of America is a secret, voluntary organization, this allegation is not only denied by the answer, but is shown to be incorrect by at least three witnesses, who testified that they were familiar with the organization and its workings, that it is not a secret organization in the ordinary acceptance of the term.

Witness Savage, secretary-treasurer of District No. 6, United Mine Workers of America, among other things, testified that:

"The United Mine Workers of America was established and organized in 1890, at Indianapolis, Indiana, but the first ground work was laid at Columbus, Ohio; it is an open organization."

Witness Lewis, president of the United Mine Workers of America since 1908, and from April 1, 1900, until March 31, 1908, vice president of the United Mine Workers of America, testified, among other things, that:

"There is nothing secret about the United Mine Workers, as was stated by Mr. McKinley. The only thing as to which there is any secret is what is called a joint meeting, when there is a joint scale

committee meeting; then the operators request that the representatives of the press be kept out. That is for the purpose of keeping the representatives of the press from knowing their inside business. A stenographer takes the proceedings of the district and national conventions, and they are published; records of the meetings of the local unions are kept by the secretary, and any person who is interested who desires may go and examine the records of a local union."

Witness Sullivan, who was serving his second year as president of District 6, United Mine Workers of America, testified as follows:

"The United Mine Workers has always been an open organization; anyone is at liberty to enter the conventions or local meetings who desires; its literature is for the public as well as for the members; there is nothing connected with it that is sought to be withheld from the public."

[702] The court below was also of the opinion that the rules of the organization undertake to "control or rather abrogate and destroy the right of the employer to contract with the men independent of the organization." If it is meant by this statement that under the rules it is possible by peaceable, persuasive, and other lawful methods to induce a majority, if not all, of the miners of any particular locality to join the union and thereby place the mine owner in a position where it may be necessary for him to negotiate with union labor in order to operate his mines, then the conclusion reached by the court below is entirely correct. However, the fact that such a result would be possible under this rule could not in any way affect the legality of the organization, because it has been repeatedly held by the courts that a labor union may use all lawful methods for the purpose of inducing others to join its order, and, until the contrary is shown, it must be assumed that only lawful methods are to be employed for the accomplishment of such purpose.

In the case of *My Maryland Lodge* v. *Adt*, 100 Md. 238, 249, 59 Atl. 721, 723, 68 L. R. A. 752–757, the court said:

"* * * They may even use persuasion to have others join their organization. They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way, but with no attempt at coercion. If ruin to the employer results from their peaceable assertion of these rights, it is a damage without remedy."

Opinion of the Court.

To the same effect is the case of *Beck* v. *Railway, etc., Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

Another ground relied upon by the court below is that the organization assumes the right through its officers (1) to control the employer's business, (2) to shut down his mine by calling out men in obedience to their obligation whenever it is deemed to be to the interest of the union, regardless of the employer's interest, or the effect that such act may have upon him as regards loss, damage, or necessary violation, on account thereof, of his existing contracts with others.

Relative to this question the witness McKinley, a member of the plaintiff organization, testified, among other things, that it was the desire of the union, as he understood it, to have every employé in and about the bituminous coal mines of the United States and Canada, as well as the anthracite mines, a member of the United Mine Workers of America. It is admitted to be the purpose of this organization to induce all miners to join the union, and, until the contrary is shown, it must be inferred that only lawful methods are to be employed by it for that purpose.

Witness Lewis also testified that:

"It is not now, and never has been, the policy of the United Mine Workers' organization to use force or coercion or any unlawful methods to promote its jurisdiction or the growth of the organization, and the moment they attempt to extend their power or usefulness by that means instantly they will go out of existence."

The witness further testifying says:

"As to the statement of the witness J. C. McKinley that he thinks probably the first method of promoting the growth of the United Mine Workers is to ask the operators to compel the men to join the union, says he, 'never heard [703] of that before; that its policy is to go into a community where there is a mine and get acquainted with some of the men who work there, and talk to them about the organization, and get them interested in joining; and after a sufficient number could be gotten together to agree that it was a good thing to join the union, a meeting would be called to organize those men, just the same as any other fraternal society.'"

In this connection it should be borne in mind that the defendants as members of this organization cannot secure em-

ployment in any mine without first entering into an agreement with operators as to the terms upon which they are to work. In other words, it is optional with the operators as to whether they shall operate their mines, and further as to whether they shall employ union labor.

It is also insisted by the court below that under these rules the operator has no right to employ non-union men even if he should desire to do so.

If the United Mine Workers of America in pursuance of this rule should resort to coercion, threats, intimidation, or violence for the purpose of preventing the mine owner from employing non-union men, such conduct would be unlawful, and the courts would promptly restrain any one who might be a party to such transaction. Indeed, it would be unlawful for an individual to undertake, by coercion, intimidation, or threats to prevent a mine owner from exercising his own free will as to the employment of non-union laborers, or as to any other thing which he might deem necessary to be done in order to protect his property rights.

However, in this instance, the plaintiff has adopted a policy by which only non-union men may be employed. If the plaintiff may for the purpose of protecting its interests adopt a policy by which only non-union men can secure employment at its mines, and such conduct be sanctioned by the law, by what process of reasoning can it be held that the defendants may not adopt the same method in order to protect their interests? If the plaintiff is to be protected in the use of such methods, and the defendants are to be restrained from using lawful methods for the purpose of successfully meeting the issue thus raised by the plaintiff, then indeed it may be truthfully said that capital receives greater protection at the hands of the courts than those through whose efforts capital in the first instance was created. But such is not the law, and when we consider the testimony as respects the conduct of the defendants, at and before the institution of this suit, we are of the opinion that the plaintiff has not by a preponderance of the evidence shown that these defendants employed unlawful methods as alleged in the bill.

At one time this identical mine employed union labor, and in all probability would have continued to do so, had it not

been for a controversy which arose as to certain adjustments and the parties failing to reach an agreement the plaintiff decided to employ only non-union labor.

It further appears that the plaintiff is paying the non-union men the same wages that are being paid union men. Therefore, under these circumstances, is it not as reasonable to infer that the plaintiff is endeavoring to place the laborers of that section in a position where it [704] would be master of the situation, as it is to infer that the defendants are seeking to destroy the business of the plaintiff? While it is true that the plaintiff has a perfect right to refuse to employ union labor, is it not equally true that union labor, as we have stated, may by the employment of legitimate means do that which is necessary to keep its forces together?

Surely we have not reached the point when capital with its strong arm may adopt a plan like this for protecting its interests, while on the other hand the laboring classes are to be denied the protection of the law when they are attempting to assert rights that are just as important to their well-being as are the rights of those who have been more fortunate in accumulating wealth. He who "seeks equity must do equity." In other words, he "must come into court with clean hands." If the courts of this country should by injunctive relief protect the mine owner in the enjoyment of his property rights and restrain the laboring people from organizing their forces by declaring such organization unlawful, would not the mine owner then be in a position to control the situation so that he who has to toil for his daily bread would be placed in a position where if he exists at all, he must do so at such wages and upon such terms as organized capital may see fit to dictate? However, we do not wish to be understood as intimating that the plaintiff or a majority of those who employ labor in this country would take advantage of a situation of this kind for the purpose of oppressing those who are at their mercy. The instances where such a course is pursued are exceptional. Thousands of manufacturing plants all over the country, as well as railroad companies and mining companies, are to-day of their own accord employing union labor, realizing

as they do that such a policy on their part is to the advantage of the employer as well as the employé. In fact, under our Constitution and laws no undue advantages are given to either capital or labor, nor will the courts ever permit individuals or labor organizations by force, fraud, or intimidation to prevent the mine owner from lawfully protecting his rights; but, while this is true, equal protection should be guaranteed to labor and capital.

It was further held by the court below that under the rules of the organization the power is given to limit the right of the employer in the absence of contract to discharge whom he pleases, when he pleases, and for what he pleases. A careful examination of the constitution of the National, District, and Sub-district organizations fails to disclose anything to justify this conclusion.

We have carefully examined the constitution to ascertain whether there can be found therein a rule or provision which authorizes the control of the employer's business by the organization, but find nothing to sustain this view, unless it be based on certain incidents in connection with the Hitchman Coal & Coke Company while it ran its mines union.

The witness, McKinley, in speaking of the United Mine Workers, said:

"The term, a union mine, is one over which they have absolute control, and a non-union mine, one which is worked open shop, or in which the United Mine Workers are not recognized."

[705] This statement as respects the extent to which the union assumes control over a union mine is flatly contradicted by the witness Savage, as well as by the testimony of Lewis and Sullivan. The witness Sullivan said:

"If the mine of the Hitchman Company had become unionized, the men would obey the management of the mine and not the orders of the union; they could not remain in the union and disobey the directions and orders of the operators, against the wishes of the union. There are no rules of the organization whereby a unionized mine must submit its men to the paramount control of the union, and I have never known any such rules to be adopted by the organization."

He further testified that one of the many purposes of the organization is to fix a fair scale of wages that should be

uniform, so far as possible, taking into consideration the varied conditions existing in the different sections of the coal-mining territory. It should be borne in mind that the scale of wages is fixed by agreement between operators and miners. Experience teaches us that the complaint of an individual is treated with indifference as compared to the complaint that is made by an organized body of men. When an individual makes a complaint, and it is refused, he must either quit work or submit to any terms that may be imposed upon him.

As a general rule employés of this kind possess but little property, owing to the fact that it requires the entire wages they earn to support their families from day to day. Under these circumstances they are unable to move from place to place to secure employment, and as a result they must accept such wages as may be offered.

Shutting down a mine by calling out men in obedience to their obligation is what is known as a "strike." Rule No. 10, which relates to strikes, is in the following language:

"No strikes shall take place at any time under the jurisdiction of sub-district 5 of District 6, except for specific violation of agreement. That is, screens irregular; failure to pay on pay day without explanation; violation of mining laws by operators, or reductions from scale wages until the grievance of the mine affected has been thoroughly investigated by the officers of District 6, U. M. W. A. and operators interested. Any man or men that cause a stoppage of work at any mine in violation of this rule, shall be subject to dismissal at the will of the company."

This very clearly sets forth the causes wherein strikes are justifiable. The evidence in this case fails to show that these defendants have at any time tried by violence, intimidation, or fraud to induce the union men to quit working for the plaintiff.

A consideration of the purposes of this organization as set forth in its constitution impels us to the conclusion that there is nothing contained therein to justify the contention that its purposes are unlawful.

[3] As we have already stated, we are of the opinion that ... common law, as originally adopted by the State ..., this organization was unlawful, it does

not follow that that part of the common law is now applicable in that State, owing to the changed conditions to which we have referred. Nor do we find anything in the statute law of West Virginia to sustain the contention that this organization is illegal. The Code of 1906, enacted in 1890 (Acts 1890, c. 9, § 1) Code 1906, c. 15H, § 14, serial section 413, as amended in 1907 [706] (Acts 1907, c. 78, § 19 [Code 1913, c. 15H, § 28 (sec. 487)]), among other things provides:

"Nor shall any person or persons, or combination of persons, by force, threats, menaces, or intimidation of any kind, prevent or attempt to prevent from working in or about any mine, any person or persons who have the lawful right to work in or about the same, and who desires to so work; but this provision shall not be so construed as to prevent any two or more persons from associating together under the name of knights of labor, or any other name they may desire, for any lawful purpose, or for using moral suasion or lawful argument to induce any one not to work in or about any mine."

This statute provides a penalty for its violation. Code W. Va. Supp. 1909, § 413a1.

As amended it went into effect May 22, 1907, prior to the beginning of the institution of this suit, and this statute was enacted in 1890, the year in which the United Mine Workers of America were organized.

To say nothing of the legislative intent, the words of the foregoing statute by implication at least recognized labor unions. Referring to the use of labels or trade-marks by labor unions, etc., there appears in the Code of 1906, as section 1, c. 62e, serial section 2859 (Code 1913, c. 62E, § 1 [sec. 2859]), the following language:

"Whenever any person, firm or corporation, or any association or union of working men, has heretofore adopted or used, or shall hereafter adopt or use any label, trade-mark, term, design, or device or form of advertisement for the purpose of designing, making known, or distinguishing any goods, wares, merchandise, or other product of labor, as having been made, manufactured, * * * such person, firm, corporation or association or union of workingmen, or by a member or members of such association or union, and shall register the same as provided in section three of this act, it shall be unlawful to knowingly counterfeit or imitate such label, trade-mark, term, design, device or form of advertisement, or to knowingly use, sell, offer

for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trade-mark, term, design, device or form of advertisement."

The fact that the legislature of that State enacted this statute, which has for its purpose the protection of labor unions in the use of what is known as a trade-mark, clearly indicates that the legislature recognized labor unions as lawful.

In the case of *Tracy* v. *Banker*, 170 Mass. 270, 49 N. E. 308, 39 L. R. A. 508, the Supreme Court of that State uses the following language in regard to the effect of legislation of this kind:

"The label is part of the well-known machinery of trades unions, and the use of it is found, if a finding be necessary, to be of value to the union and its members. It would not be traveling too far from the record, perhaps, if we should assume that the use of the label is in fact, as certainly it might be, of far more economic importance to the union than are many or most of the trade-marks, strictly so-called, which are protected by the courts. * * *

"It is impossible to believe that when the statute mentions unincorporated unions it does not refer to trade unions. It authorizes such unions to adopt, as well as to record, a label. Therefore it creates a right, if the court is unable to recognize one without its aid. If it applies to trade unions, it must be taken to apply to them as they ordinarily are; that is, as associations of workmen, not as manufacturers or venders of goods. It contemplates that the labels would be applied to merchandise, as of course they must be, and as these labels are. * * *

"If, as we think, the statute expressly creates or recognizes the right of trade unions to be protected in the use of labels for trade union purposes, the [707] suggestion that the association represented by the plaintiff is an unlawful association falls of itself. It is too late to make such a contention as to trade unions generally, even apart from the statute under which this suit is brought. But the general purposes of this union are similar, so far as we know, to the general purposes of other unions."

In view of what we have said as to the status of these organizations at common law, and the further fact that there is an implied, if not direct, recognition of labor unions by statute in West Virginia, and there being no enactment declaring the same to be unlawful, we are of the opi
the court below erred in declaring these organizati
unlawful at common law.

Opinion of the Court.

At the final hearing the plaintiff introduced certain documentary evidence bearing upon the question as to whether the defendants had entered into a combination with operators and coal producers in Ohio, Western Pennsylvania, Illinois, and Indiana, competitive fields, to compel the plaintiff to submit to contractual relations with the United Mine Workers of America relating to the employment of labor and production, contrary to the wishes of plaintiff.

This evidence was offered in support of plaintiff's oral testimony, and consisted of the proceedings of the various joint conferences of coal operators and coal miners of the States in question, held during the years 1906, 1907, 1908, 1910, and 1911. Also, book entitled "Official Mining Scale of Association of Pittsburgh Vein Operators of Ohio for their Mines in Belmont, Harrison, and Jefferson Counties, Ohio, and the United Mine Workers of America." Also, book entitled "United Mine Workers of America, District No. 6, Ohio, Issued by the Authority of the Executive Board of District No. 6 (Ohio Members), United Mine Workers of America. G. W. Savage, Secretary-Treasurer. For Scale Year, April 1, 1908, to March 31, 1910." Also, book entitled "Detailed Mining Scale for Sub-district 5 of District 6, U. M. W. of A. Effective from April 1, 1910, to March 31, 1912." Also, "Excerpts from President T. L. Lewis' Report to the Twentieth Annual Convention of the United Mine Workers of America, Held at Indianapolis, Indiana, in January, 1911, as Published in the United Mine Workers Journal in its Issue of January 19, 1911." Also, "Expenditures of the United Mine Workers of America for the Year 1910." Also, "Income of the United Mine Workers for the Year 1910."

Thirteen exhibits of this kind were introduced over the objections of counsel for defendants.

The court in referring to this phase of the question said:

"I further conclude that this union, in pursuit of its unlawful purposes to secure control and the monopoly of mine labor, and to restrain, suppress, if not destroy, the coal mining industry of West Virginia in the interest of the co-conspirators, rival operators, and producers in Ohio, Western Pennsylvania, Illinois, and Indiana,

Opinion of the Court.

competitive fields, have sought and still seek to compel the plaintiff, the Hitchman Coal & Coke Company, to submit to contractual relations with it as an organization, relating to the employment of labor and production contrary to the will and wish of said company; that its officers, in pursuance of such unlawful efforts to monopolize labor and restrain trade, and with knowledge of the express contracts existing between this plaintiff and its employés, have unlawfully sought to cause the breach of the said contracts on the part of its said employés."

[708] [4] The documentary evidence consisted of the declarations of a small percentage of the miners and operators who were present at these conferences. It was not shown that either before or after these declarations were made that those participating in the conference had entered into a conspiracy for an unlawful purpose. Indeed, these declarations were brought out in response to a proposition on the part of the miners for an increase of wages. A fair interpretation of the evidence shows that it was the purpose of the defendants to induce the miners of West Virginia to become members of the organization, and thereby secure as high wages as possible, compatible with the successful operation of the mines of that State by the respective owners. They had a perfect right to form a combination to accomplish such purposes by peaceable and lawful methods, and so long as they refrained from resorting to unlawful measures to effectuate the same they could not be said to be engaged in a conspiracy to unionize plaintiff's mine.

As we have already stated, the evidence fails to show that any unlawful methods were resorted to by these defendants in this instance. Therefore the court erred in holding the organization to be unlawful upon the theory that it was guilty of a conspiracy.

The opinion of the court below is based upon the ground that the defendants and those associated with them prior to and at the time of the institution of this suit had formed themselves into a conspiracy for the purpose of unionizing the plaintiff's mines without its consent, and for violation of the constitution, common and statutory law of West Vir-

[5] Chief Justice Fuller, in *Pettibone* v. *United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, defined "conspiracy" as follows:

"A 'conspiracy' is * * * a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

Being of the opinion that this is a lawful organization, it necessarily follows that, in order to entitle the plaintiff to the relief which it seeks, it must be made to appear that at and before the institution of this suit the United Mine Workers of America were attempting to carry out the purposes of their organization by the use of unlawful means.

[6] Considerable evidence was introduced by the plaintiff as to what occurred in the vicinity of the plaintiff's mine.

Paul Leonard, superintendent of the Richland mine, was introduced, and among other things testified that he had met a man by the name of Thomas Hughes on the Richland Coal Company's property, and had had a talk with him in regard to the organization; that Hughes told him that it was his purpose to organize the Panhandle district of West Virginia. Among other things, the counsel put the following question to him:

"Q. What did you understand him to say his meaning was when he said that he was there to organize the Panhandle district?—A. Why, that he would make them join the United Mine Workers or tie them up were the words he used to me."

[709] Counsel also asked him the following question:

"Q. Did he (meaning Hughes) make any explanation as to what he meant by tying up the Panhandle?—A. That they would organize us and we would recognize the union."

The witness further says:

"My understanding of it was that if the company did not recognize this union that the mines would be shut down."

This was a threat by one who was without power to execute the same. Nowhere do we find any evidence tending to show that Hughes was authorized to shut down any of the mines of that vicinity. It should also be remembered

Opinion of the Court.

that Leonard further testified that Hughes said nothing about the plaintiff's mine.

[7] Austin, another witness for plaintiff, testified that he saw Hughes around there several times in the store and on the streets, and he also identified a card which was in the following language:

"Notice. To the miners of the Hitchman mine: There will be a mass meeting Friday evening at 6.30 p. m., at Nick Heil's baseball grounds, for the purpose of discussing the principles of organization. President Green will be present. All miners are cordially invited to attend."

These people, the defendants assert, had a right to hold a meeting at the baseball grounds for the purpose of discussing in an orderly manner the matters that related to their organization, and that this is especially true, inasmuch as the meeting was called for a lawful purpose and the public generally invited to attend.

Witness Knapp also testified that he had taken down and carried away one of the notices that had been posted on a telephone pole; that Hughes had stopped him in the street, just as he was entering a private driveway, and said things to him that he did not suppose should be repeated in the presence of the court; that he attacked him very maliciously and vigorously and was very mad.

We fail to understand upon what grounds the plaintiff or his agents claimed the right to prevent the defendants from holding meetings for the purpose of discussing matters relating to their organization.

Robert Myers was also introduced as a witness by the plaintiff, and, among other things, testified as follows:

"Q. Did you have any talk with a man by the name of Thomas Hughes?—A. I remember him; yes, sir.

"Q. You remember a man by that name?—A. Yes, sir.

"Q. What was he doing there—if he was about the Hitchman Mine—if you recall?—A. Well, he explained to me that he was trying to organize the place again.

"Q. What is that?—A. To organize the Hitchman coal miners again.

[illegible] mean by organizing?—A. To get us organized—[illegible]ed Mine Workers of America.

Opinion of the Court.

"Q. What did he say to you?—A. Well, he said it would be a very nice thing if we would go back again; and so he said if I would put my name down and give him 50 cents on a book (he did not show me the book, but said it had lots of names down on it of the Hitchman coal miners); he said if I would give him 50 cents I would be entitled to a union card to go any place and get a job, if the Hitchman company would fire me, and he would put my name down on his book.

"Q. Did you give him the 50 cents?—A. No, sir.

"What did you say to him on that subject?—A. Well, I said I would **[710]** not do anything like this; he might be a stranger and I did not know that he was the man that he said he was, and, anyhow, I was awful careful in putting my name down to anything. He told me that he was a good friend of Mr. Koch, and that Mr. Koch had nothing against having the place organized again. He said he was a friend of his and I made the remark that I would ask Mr. Koch and see if it was so; and he said, no; that was of no use, because he was telling me the truth.

"Q. Did he show you any book?—A. No, sir; I was trying to see the names on the book, but he would not show me anything. He told me he had it and I asked him how many names was on it, and he said he had about enough to 'crack off.'

"Q. What is that?—A. That is what I didn't understand.

"Q. Did you ask him what he meant by 'crack off'?—A. The time was too short; no, sir. I was waiting for my street car to go home on and I went on the car.

"Q. Did you say anything to Hughes about the job that you then had at the Hitchman mine?—A. Yes, sir.

"Q. Well, what did you say, if you can recollect?—A. Well, I told him that I didn't care much about being organized again, because I had too much experience already how it goes. I told him I was in several strikes and there wasn't anybody that helped me out, and I had to beg the company to get my job back again after I lost my job.

"Q. Did you say anything to him about having any property?—A. Yes, sir; I told him it was impossible for me to go any place, because I could not walk around with my property on my back and hunt another job. I says, 'I have work where I am now, and, as long as the company treats me as they are treating me, I will not do anything against them that they didn't like to have.'"

Mike Papage, another witness for the plaintiff, testified as follows:

"Q. What did he talk to you about?—A. Oh, he tried to get me along with him to help him out so he could get the Hitchman mine organized again.

"Q. In what way did he ask you to help him?—A. To help him to get the people together, and everything, and he was to pay me for it.

Opinion of the Court.

"Q. Were there at that time many men employed at the Hitchman mine who were foreigners?—A. Yes, sir.

"Q. Did you speak their language?—A. Yes, sir.

"Q. Could he speak their language?—A. No, sir.

"Q. Did he want you to interpret—you understand what interpret means?—A. Yes, sir.

"Did he want you to interpret what he said to those men.—A. Yes, sir.

"Q. Did you do it?—A. No; I would tell him I don't do it.

"Q. Then what did he say?—A. He got mad and went away.

"Q. After that did you see him any more?—A. Yes, sir.

"Q. How did he treat you after that? I mean how did he treat you when you did not agree to interpret for him?—A. Why, he came to my house—the second time he came to my house.

"Q. You mean he came to your house a second time?—A. Yes, sir.

"Q. Then he had been there before?—A. No; not before.

"Q. The second time you talked to him he came to your house. Is that the idea?—A. Yes, sir.

"Q. Well, what did he say then?—A. He tried to get me to interpret again, and promised me a good job and everything else.

"Q. Did that appeal to you then? Did you agree to do it then or not?—A. No, sir; I would tell him I had nothing to do with him any more.

"Q. Why did you tell him that?—A. They blamed me for not getting the men organized; they said it was my fault that the people kept on working.

"Q. And that Hughes could not organize the mine?—A. Yes, sir.

"Q. Did Hughes tell you that?—A. Yes, sir; he said that is what he heard off of the people.

"Q. That is, you mean, the men that were working in the mine.—A. Yes, sir.

[711] "Q. Did he tell you at any time how he was getting along?—A. No.

"Q. Did he succeed in organizing the men there? Did he organize the men at the Hitchman mine.—A. No.

"Q. Did the mine continue working while he was there?—A. Yes, sir."

James Stewart, another witness for the plaintiff, testified as follows:

"Q. Were you about the Hitchman mine, working there, in the fall of 1907, when Thomas Hughes was there?—A. Yes, sir.

"Q. Did you see Thomas Hughes there?—A. Yes, sir; I saw him there several times.

"Q. Did you have any talk with him?—A. Yes, sir; I talked with him several times.

Opinion of the Court.

"Q. Did you hear him talk with any other persons?—A. He was around there all the time and he was talking to everybody he would come to.

"Q. To men employed at the Hitchman mine?—A. Yes, sir.

"Q. Did he tell you what he was there for?—A. Yes, sir.

"Q. What was it?—A. He told me he was there to try to organize the mine.

"Q. Did he say what his business was?—A. Yes, sir.

"Q. What was it?—A. He said he was an organizer.

"Q. For what?—A. For the United Mine Workers, and that he was there for that purpose. But I knew him before he came around there.

"Q. You did know him before that?—A. Yes, sir.

"Q. What did he say to you, if anything, with relation to organizing the mine?—A. I do not remember all that he did say, but I remember one certain thing that he said. He told me during one night that he was going to have a meeting called up there. I do not know what the date of it was, but it was in the latter part of August or first of September. He told me he had a couple of meetings there, but he did not seem to think it was any good; but he told me he was forming a kind of secret order among the men. He said he had a few men—he did not state the number of them—and he said each man was supposed to give him so much dues to keep it going; and then he said after he got the majority he would organize the place. He asked me what I had to say about it, and I told him my job at the present time was satisfactory and the men had agreed with the company not to organize and not to have anything to do with the organization, and I told him I did not want to have any trouble and nothing to say, anyway; and I think that was the last time I saw Hughes around there. I saw him after that, across the river, but I didn't have any talk with him.

"Q. Did he say anything to you about quitting work at the Hitchman and going to a union mine?—A. Yes, sir; he told me about it. He said he would get me a job, and I told him that might be all right about that, but I told him I did not think he could place me in any job any better than the one I had at the present time; and that is about as far as that went.

"Q. You say you remember of some meeting being held?—A. Yes, sir.

"Q. What kind of a notice did he put out for the meetings?—A. Well, I could not just say about the notices.

"Q. Did he mark on the pavements, or anything of that kind?—A. Well, there was names around there, about meetings, but I do not know whether he wrote them, or who wrote them. I could not state just what was on them, but we miners claimed that that was what the purpose was.

"Q. Were there calls for meetings marked on the pavements?—A. Yes, sir.

Opinion of the Court.

"Q. In chalk or some substance like that?—A. It was in chalk.

"Q. White chalk?—A. Yes, sir.

"Q. Was that done anywhere near the Hitchman mine?—A. Well, the one I saw was right in front of Wilhelm's saloon, on the sidewalk.

"Q. Where is Wilhelm's saloon, with reference to the mine?—A. It was about 150 yards north of the mine.

"Q. Did you attend any of the meetings that he held?—A. No.

"Q. Did he say anything to you along the line of thought that unless you joined the union at that time, if the mine were unionized you would not get a job?—A. Yes, sir; he stated to me that if we did not go in the local, or stay away from there and work where mines were organized, that we would [712] not ever be able to get a job in a union mine, but I have worked in two union mines since that, and had two union cards, and then came back to the Hitchman.

"Q. Did you hear him talk with others along the same line?—A. Yes, sir; he talked with them all about the same, that I ever heard him talk to.

"Q. Did you hear him tell them that unless they joined them, that if the mine was organized they would be out of a job and they could not get any?—A. He was talking to me and there was five or six or seven sitting there in a bunch, and they all heard just the same as I did about it.

"Q. Did he say what he was going to do with the men when he got enough to organize?—A. Yes, sir.

"Q. What did he say he was going to do?—A. He stated when he got a majority he was going to organize the mine. I expect the meaning of it was that he was going to organize whether it was against the company or not.

"Q. Did he say anything about shutting the mine down if they did not unionize it?—A. He stated it that way—that whenever he got a majority he was going to organize or they would close the place down.

"Q. In point of fact, did he get a majority and unionize the mine or not?—A. No, sir; I think he failed."

On cross-examination, this witness further said:

"Q. Well, then, while he was there he was trying to get men to join the union?—A. Yes, sir.

"Q. And he invited you to join the union?—A. Yes, sir.

"Q. And told you he thought it would be better for you to join, didn't he?—A. Yes, sir; that is what he said.

"Q. And he said if you worked there and happened to be discharged, you could not get into a union mine?—A. That is what he said.

"Q. His idea was that there were a great many more union mines across over in Ohio than there were non-union, wasn't it?—A. I ex- ... he meant.

... you any further reasons why he thought it ... join the union?—A. No; not just exactly."

The foregoing was substantially all the evidence that was introduced as to what occurred in the vicinity of plaintiff's mine prior to the institution of this suit, to show that the defendants had entered into a conspiracy as alleged.

While it is not denied by the defendants that they sought by peaceable methods to induce those employed by the plaintiff to join the union, yet they stoutly contend that at no time since the mine has been operated as a non-union mine have they employed unlawful methods. We fail to find that there is sufficient legal evidence to show that the defendants entered into a conspiracy or combination for the purpose of unionizing the plaintiff's mine. While there was evidence admitted by the court below as to statements made by certain officials of the United Mine Workers of America and the coal operators of Pennsylvania and other States bearing upon this question, yet there is no evidence to show that the United Mine Workers of America combined, or formed themselves into a conspiracy for the purpose of unionizing plaintiff's mines after it started to run its mine non-union in June, 1906.

The declarations of Hughes and Rankin are incompetent as against the organization, its officers and members, inasmuch as there is not sufficient legal evidence to establish the fact that the defendants, as members of the United Mine Workers of America, prior to and at the time of the institution of this suit formed a conspiracy; nor is there sufficient evidence to show that Rankin and Hughes were parties to such alleged conspiracy.

[713] While Hughes was a representative of the organization, his authority only permitted him to use argument and persuasion to induce the employés to become members of the organization. This was shown by the evidence of the witness Savage.

A considerable portion of the evidence bearing upon the alleged unlawful conduct of the union in connection with the operation of the plaintiff's mine relates to the time that it was running its mine union, and the period intervening between the time it ceased operations at its mine until it resumed on a non-union basis in June, 1906. For instance,

Opinion of the Court.

the plaintiff complains of what happened during the strike which occurred when the mine employed union labor. Evidence was also introduced to show why the plaintiff did not continue to operate its mine on a union basis. This evidence shows that the real difference at that time was as to the price or scale to be paid for run of mine coal. While this evidence tends to show why the plaintiff declined to operate its mine on a union basis, it cannot have any material bearing upon the issues raised by the pleadings in this cause, and is therefore, as to matters now in controversy, a closed incident.

[8] Each party was at arm's length from that time on, and the refusal on the part of the plaintiff to continue the employment of union labor had the effect of severing the relations that had theretofore existed between the plaintiff and the defendants. Therefore evidence tending to show that prior to that date the defendants were engaged in a combination or conspiracy, and by intimidation, violence, and coercion were trying to prevent the plaintiff from operating its mine, would be incompetent. In other words, even though it appears from the evidence in question that the conduct of the defendants was reprehensible in the highest degree at the time that the mine was being run on a union basis, we conceive of no possible theory upon which such evidence would be competent as affecting the conduct of the defendants in this instance, inasmuch as the evidence fails to show that after the mine began to be operated on a non-union basis that they united and conspired to use violence, intimidation, and coercion to prevent the plaintiff from operating its mine. In other words, this record clearly shows that the plaintiff for the avowed purpose of protecting its interests adopted a policy by which its mines were to be operated on a non-union basis. At the time of the adoption of this policy by the plaintiff, the negotiations between plaintiff and defendants ceased, therefore the question now presented is: Have not the defendants the right as an organization to use all means within their power to organize miners into unions, provided that in so doing no unlawful methods are employed?

[9] The court below, among other things, expressed the view that the United Mine Workers of America constituted a combination or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, under what is known as the Sherman Anti-Trust Law (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[10] We do not deem it necessary to discuss this proposition at any great length. In the first place, there is nothing in the pleadings to raise the question as to whether the United Mine Workers of America [714] are liable under the statute in question, and any evidence that may have been introduced bearing upon this point was therefore immaterial and should have been rejected. There is another reason why we think that this question cannot under any view of the case arise in this controversy, to wit, we do not understand that a private person can question the validity of a combination or conspiracy under the Sherman Anti-Trust Law for the purpose of having the same declared to be unlawful. The scope of this act is disclosed in the case of *National Fire Proof Company* v. *Mason Builders' Association*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148, in which the court said:

"But the complainant asserts that the agreement in this case is positively unlawful and not merely negatively invalid—that it contravenes both National and State statutes against combinations, and thus does give rights of action to injured persons. With respect to the Federal statute, it is not obvious in what way a trade agreement between builders and bricklayers, relating to their work in the State of New York, can be said to directly affect interstate commerce; but the consideration of this question is not necessary, because a person injured by a violation of the Federal act cannot sue for an injunction under it. The injunctive remedy is available to the Government only. An individual can only sue for threefold damages." *Greer* v. *Stoller* (C. C.) 77 Fed. 2.

Also, the case of *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870, is to the same effect.

[11] The court below also reached the conclusion that the defendants have caused and are attempting to cause the non-union members employed by the plaintiff to break a

contract which it has with the non-union operators. The contract in question is in the following language:

"I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employé of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time while I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America, or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company that I will not make any efforts amongst its employés to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read."

It will be observed that by the terms of the contract that either of the parties thereto may at will terminate the same, and while it is provided that so long as the employé continues to work for the plaintiff he shall not join this organization, nevertheless there is nothing in the contract which requires such employés to work for any fixed or definite period. If at any time after employment any of them should decide to join the defendant organization, the plaintiff could not under the contract recover damages for a breach of the same. In other words, the employés under this contract, if they deem proper may, at any moment, join a labor union, and the only penalty provided therefor is that they cannot secure further employment from the plaintiff. Therefore, under this contract, if the non-union men, or any of them, should see fit to join the United Mine Workers of America on account [715] of lawful and persuasive methods on the part of the defendants, and as a result of such action on their part were to be discharged by the plaintiff, it could not maintain an action against them on account of such conduct on their part. Such being the case, it would be unreasonable to hold that the action of the defendants would render the United Mine Workers of America liable in damages to the plaintiff because they had employed lawful methods to induce the non-union miners to become members of [illegible] organizati[illegible]

Under these circumstances, we fail to see how this contract can be taken as a basis for restraining the defendants from using lawful methods for the purpose of inducing the parties to the contract to join the organization.

This is an age of coöperation through organization. In fact, organization is the only means by which united effort can be secured in any branch of human endeavor. The doctors, dentists, school-teachers, wholesale and retail merchants, bankers, and manufacturers, and in fact every branch of industry in this country, are organized for the purpose of the mutual protection of the respective parties interested. Such being the case, it is just as essential, and perhaps more important, that the laboring people should organize for their advancement and protection, than it is for any of the vocations we have mentioned.

While labor and capital are vitally interested in the proper solution of these questions, it should be remembered that the public is likewise interested, and in some instances affected to a greater extent than either labor or capital on account of the disputes and lawsuits growing out of these matters. Therefore it may be properly said that these questions have a bearing upon the welfare of a large percentage of our people, and this is especially true as respects the coal industry. For instance, the suspension of the operation of coal mining in this country would in all probability result in a coal famine, which would, in a large measure, embarrass the manufacturers, to say nothing of the effect it would have upon the individual consumer, and all reasonable means should be employed to avert such a disaster. Therefore we deem it our duty to define the rights of the parties to this controversy, in so far as we may under the facts of this case, so as to set at rest as many as possible of the vexatious questions that are a source of irritation, as well as productive of much litigation.

In the first place, it should be understood once and for all that, so long as capital employs legitimate means for the protection of property rights, it is to be accorded the protection of the law; but this does not mean that capital may, by improper methods, form combinations for the purpose of pre-

venting labor from organizing for mutual protection. Likewise, it should be definitely understood that the laboring men have the right to use peaceable and lawful methods to unite their forces in order to improve their condition as respects their ability to earn a decent living; give their children moral and intellectual training; and secure the enactment of legislation requiring mine owners to adopt such methods as may be necessary to keep their mines in a sanitary condition, and, above all, to adopt methods to minimize, as much as possible, the occurrence of the awful catastrophes by which so many human lives have been lost. It should be understood that when a con [716] troversy arises between labor and capital that the use of dynamite or any other unlawful methods on the part of the representatives of labor, whereby property and human lives are destroyed, is not to be tolerated by the courts.

The relative rights of the parties are entitled to equal consideration, and we feel sure that when such controversies arise that they will be dealt with in the same spirit that actuates the courts in adjusting the differences between individuals, wherein questions are involved affecting the ordinary transactions of life.

Until it is provided by State and national legislation that labor disputes shall be settled by arbitration, it will be the duty of the courts to determine questions of this character, when a proper case is presented. Under the law as it now exists, when property or personal rights are involved, the courts alone can furnish adequate relief. However, while this is true, we think that care and caution should be exercised in the issuance of injunctions of this character.

We are inclined to the belief that in some instances a reasonable delay in the issuance of the writ would have a tendency to bring about a settlement between the parties by which the rights of both could be amply protected, and thus avoid the expense incident to litigation, to say nothing about the injury sustained by the employer as well as the employé, occasioned by the suspension of operations.

In no instance should a union be restrained from using [illegible]d peaceable methods for the purpose of maintain-

ing its organization; but, while this is true, the court should restrain those who by violence, coercion, and intimidation seek to deprive the mine owner of the right to use his property as he may see fit.

We have carefully considered the cases relied upon by the plaintiff, but are of opinion that they do not apply to the case at bar. For the reasons stated, the decree of the court below is reversed, and the cause remanded, with instructions to dismiss the bill at plaintiff's costs.

Reversed.

BITTNER ET AL. *v.* WEST VIRGINIA-PITTSBURGH COAL CO.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1914.)

[214 Fed. 716.]

INJUNCTION (§ 101)—STRIKERS—AID TO STRIKERS.—An injunction may be properly granted restraining members of a trade-union from using violence, intimidation, and coercion to induce employés to join the union and to strike, but they may not be lawfully restrained from using persuasion and other peaceable methods to that end, or from aiding striking employés by furnishing them money from a relief fund.[a]

[Ed. Note.—For other cases, see Injunction, Cent. Dig., §§ 174, 175; Dec. Dig., § 101.]

Restraining boycotts, strikes, and other combinations by employés interfering with commerce or business, see note to *Shine* v. *Fox Bros. Mfg. Co.*, 86 C. C. A. 313.]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

[717] Suit by the West Virginia-Pittsburgh Coal Company against Van Bittner and others to restrain defendants from interfering with complainant's non-union employés. From an order granting complainant a preliminary injunction, defendants appeal. Modified and affirmed.

John C. Palmer, jr., of Wheeling, W. Va., and *A. M. Belcher*, of Charleston, W. Va. (*Erskine, Palmer & Curl*, of Wheeling, W. Va., on the brief), for appellants.

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[a] Syllabus copyrighted, 1914, by West Publishing Company.

Opinion of the Court.

John A. Howard, of Wheeling, W. Va., and *J. F. Cree*, of Wellsburg, W. Va., for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and WADDILL, District Judge.

PRITCHARD, Circuit Judge.

This is an appeal by the defendants below from a preliminary injunction granted by the District Court of the United States for the Northern District of West Virginia, on the 2d day of December, 1913, in the above-entitled cause.

The questions of law involved in this suit were passed upon by this court in the case of *John Mitchell, T. L. Lewis, et al.* v. *Hitchman Coal & Coke Co.*, 214 Fed. 685, 131 C. C. A. 425, at the present term of this court. The decree of the lower court in that suit was reversed at the cost of the plaintiff for the reasons stated in the opinion filed therein. However, the facts in this controversy are different from those of the former suit, in that it appears from the evidence that violence, intimidation, and coercion were resorted to by the defendants in this instance.

The court below granted a preliminary injunction restraining the defendants from committing acts of violence, intimidation, and coercion, and also from the use of persuasion and other peaceable methods, and from aiding the striking miners by furnishing them money from what was known as a relief fund, etc. The defendants made a motion to modify the decree in so far as it restrained them from resorting to persuasive and peaceable methods, and from aiding the striking miners by furnishing them money. This motion was disallowed, and the case comes here on appeal.

We think the decree of the lower court in so far as it restrains the defendants from any acts of violence, intimidation, and coercion is proper in view of the evidence. While this is true, nevertheless we are of opinion, for the reasons stated in the case of *John Mitchell, T. L. Lewis, et al.* v. *Hitchman Coal & Coke Co.*, *supra*, that the court below erred in entering that portion of the decree whereby it is provided that these defendants shall be restrained from re-

Syllabus.

sorting to peaceable and lawful methods for the purpose of organizing the miners of that section.

It follows that the decree of the lower court should be modified by adding thereto the following proviso:

Provided, however, that this restraining order is not intended to prevent any of said employés of the plaintiff company from quitting work for said plaintiff and from severing the relations of master and servant existing between the plaintiff and said employés at the time [718] this order is entered, or from striking or persuading his fellow employés to quit work and strike for their mutual protection and benefit.

Provided further, that this injunction is not intended to prevent any employé of the plaintiff who had ceased to work for said plaintiff to use persuasion, but not violence, to prevent other men from accepting employment with the plaintiff in his place.

Provided further, that this injunction is not intended to prevent the employés of plaintiff from joining any lawful labor union and from receiving the non-employment benefits paid by such union.

Provided further, that this injunction is not intended to prevent the defendants, their associates, agents, and fellow members of the United Mine Workers from supporting any of plaintiff's former employés who have ceased to work for said plaintiff, nor is this injunction intended to prevent any member of the labor union to which such employés ceasing to work for the plaintiff belong from legally assisting said employé in securing better terms of employment and in endeavoring to persuade, without violence, any other laborer from taking the place of said striking employé.

The decree of the lower court as thus modified is affirmed.
Modified and affirmed.

UNITED STATES *v.* INTERNATIONAL HARVESTER CO. ET AL.[a]

(District Court, D. Minnesota. August 12, 1914.)

[214 Fed. Rep., 987.]

MONOPOLIES (§ 12)—ANTI-TRUST ACT—CONSTRUCTION—COMBINATION IN RESTRAINT OF TRADE.—A combination may be one in restraint of interstate trade and commerce, or to monopolize a part of such trade and commerce, in violation of Sherman Act July 2, 1890,

[a] Case pending in the Supreme Court on the appeal of defendants.

c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), although such restraint or monopoly may not have been attempted to any harmful extent, but is potential only.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 12)—RESTRAINT OF TRADE—COMBINATION.—The elimination of competition between competing concerns, if illegal, is equally so, whether effected by an agreement or by a consolidation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 12)—COMBINATIONS IN "RESTRAINT OF TRADE."—Suppression of competition by means of a combination, where the parties to it control a large portion of the interstate or foreign commerce in the article, and where there is no obligation to form the combination arising out of the fact that they are losing money or the like, is an undue "restraint of trade."

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, vol. 7, pp. 6185, 6186.]

MONOPOLIES (§ 14)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.—Defendant International Harvester Company was a consolidation of five harvester companies, which together produced from 80 to 85 per cent of all the harvesting machinery sold in the United States. Some or all of them were prosperous, and there had previously been keen competition between them. One of the combining companies, of which defendant owned all the stock, was changed in name and made the sole selling agent for all of the products of the several plants. Defendant was not overcapitalized, and its methods of doing business were in general fair to competitors. It purchased all of the stock of another large harvester company, but permitted it to continue to do business and to advertise as an independent and competing concern. *Held*, that defendant was organized to eliminate competition between the combining companies, and was from the beginning a combination in restraint of interstate commerce, and to monopolize such commerce in harvesting machinery, and illegal, as in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.]

Sanborn, Circuit Judge, dissenting.

In Equity. Suit by the United States against the International Harvester Company and others. On
ing. Decree for complainant.

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[988] *The Attorney General* and *Edwin P. Grosvenor*, Sp. Asst. Atty. Gen., for the United States.

John P. Wilson, of Chicago, Ill.; *Wm. D. McHugh*, of Omaha, Neb.; and *Edgar A. Bancroft*, of Chicago, Ill. (*Philip S. Post* and *Victor A. Remy*, of Chicago, Ill., of counsel), for defendants.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

The petition in this case was filed April 30, 1912, under section 4 of "An act to protect trade and commerce against unlawful restraints and monopolies," generally known as the "Sherman Law." Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

Under that section the Circuit Court was vested with jurisdiction of such suits, but the Circuit Court was abolished by Judicial Code (act March 3, 1911, c. 231, 36 Stat. 1167 [U. S. Comp. St. Supp. 1911, p. 243]) § 289, and by section 291 the jurisdiction under section 4 of the Sherman Law passed to the District Court. The Attorney General having, under act Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1911, p. 1383), filed with the clerk of the District Court a certificate that this case is of general public importance, the same came on for hearing before the Circuit judges named, notwithstanding the abolishment of the Circuit Court. Ex parte United States, 226 U. S. 420, 33 Sup. Ct. 170, 57 L. Ed. 281.

The petition makes defendants the International Harvester Company, the International Harvester Company of America, the International Flax Twine Company, the Wisconsin Steel Company, the Wisconsin Lumber Company, the Illinois Northern Railway Company, the Chicago, West Pullman & Southern Railroad Company, Cyrus H. McCormick, Charles Deering, [illegible] John J. Glessner, William H. Jones, Harold [illegible] Richard F. Howe, Edgar A. Bancroft, [illegible] William J. Louderback, [illegible] B. Bean [illegible] A. Chapman,

Opinion of the Court.

Elbert H. Gary, Thomas D. Jones, John P. Wilson, William L. Saunders, and George W. Perkins.

All of these defendants made answer. The case was tried and has been submitted to the court for a decree. As the pleadings are elaborate, covering more than 130 pages of printed matter, and as no questions have been raised as to the sufficiency of any of them, we will state the facts as shown, contenting ourselves with saying that all of the facts found by the court are either expressly covered by the allegations of the pleadings or are within the necessary implications thereof. In their argument defendants' counsel say:

"This case is one of fact, not of controverted questions of law."

It will be necessary, therefore, to review the facts fairly, fully, but not elaborately, as there are 18 volumes and nearly 10,500 printed pages in the record.

Agricultural implements may be divided into five classes:

(1) Tillage implements, such as plows, harrows, and other instruments used in keeping the soil in good condition.

[989] (2) Seeding implements, such as corn planters, drills, and seeders.

(3) Harvesting implements, such as harvesters, mowers, reapers, rakes, and the like.

(4) Threshing machines.

(5) Implements for general agricultural use, such as wagons, manure spreaders, gas engines, cream separators, tractors, and certain similar tools and instrumentalities.

The defendant the International Harvester Company, hereafter called the International Company, was organized on August 12, 1902, under the laws of New Jersey. The objects for which it was organized, as stated in the articles of incorporation, were:

"To manufacture, sell, and deal in harvesting machines, tools, and implements of all kinds, including harvesters, binders, reapers, mowers, rakes, headers, shedders, machinery, engines, wagons, motor vehicles, and vehicles of all kinds; agricultural machinery, tools, and implements of all kinds, binder twine, and all devices, materials, and articles used or intended for use in connection therewith, and all [illegible] parts and other devices, materials, and articles used, or in-[illegible] for use, in connection with any kind of harvesting or agricul-

tural machines, tools, or implements, or any gasoline, electric, or other vehicles.

"To engage in the manufacture or production of, and to deal in, any materials or products which may be used in, or in connection with, the manufacture of harvesting or agricultural machines, tools, and implements."

Prior to that time the principal manufacturers of harvesting implements in the United States had been:

First. The McCormick Harvesting Machine Company, a corporation, of Chicago, Ill., founded about 1849:

Second. D. M. Osborne & Co., a New York corporation, with a plant or plants at Auburn, N. Y., founded about 1860;

Third. The Warder, Bushnell & Glessner Company, an Ohio corporation, with its manufacturing plant at Springfield, Ohio, and its offices at Chicago, Ill., which manufactured under the name of the Champion, founded about 1869;

Fourth. The Deering Harvester Company, a copartnership, of Chicago, Ill., founded about 1875;

Fifth. The Milwaukee Harvester Company, of Milwaukee, Wis.; and

Sixth. The Plano Manufacturing Company, of West Pullman, Ill.

While these were the leading manufacturers of harvesting machines, they had other, but not general, lines of manufacture of agricultural implements.

On June 24, 1902, P. D. Middlekauff secured, in his own name, an option on the stock and plant of the Milwaukee Harvester Company, for $3,123,691.90. He did this in fact as agent, though it does not clearly and certainly appear who his principal was, whether J. P. Morgan & Co., George W. Perkins, or the McCormick Harvesting Machine Company. He did it, however, at the direct instance of the McCormick Harvesting Machine Company, but whether it was acting as principal or agent is left in some slight doubt.

On June 25, 1902, Mr. Middlekauff went to New York with a letter from an officer of the McCormick Company, authorizing him to assign this option to J. P. Morgan & Co., of which George W. Perkins was a [990] member, or to anyone they might designate, and reciting that the option had been obtained "for us." Mr. Middlekauff remained in

Opinion of the Court.

New York until July 30, 1902, aside from being absent a small portion of the time in Philadelphia and Washington on business for Mr. Perkins.

On August 11, 1902, a new contract was made for the purchase of the Milwaukee Harvester Plant by Mr. Middlekauff, and on the same day he assigned his contract to Mr. William C. Lane, a New York banker and then president of the Standard Trust Company.

In July, 1902, the representatives of the McCormick, the Deering, the Warder, Bushnell & Glessner, and the Plano were all in New York, but stopping at different hotels and not seeing one another. They were all seeing, however, Mr. George W. Perkins. On July 28, 1902, they met and gave separate contracts to William C. Lane, heretofore referred to, and his assigns, to sell all their tangible property and specified portions of their bills receivable. These agreements all contained a recital that the purchaser, upon his acquisition of the property, intended to transfer the same to a corporation to be organized under the laws of Illinois, or some other State, called the "purchasing company." It was in each case, except that of the Warder, Bushnell & Glessner Company, stipulated that the entire purchase price should be paid in fully paid non-assessable stock of the purchasing company.

On August 11, 1902, the companies all signed an agreement for the immediate delivery of their plants and property, without waiting for any appraisement theretofore stipulated for in each instance.

On August 12, 1902, the very day of the organization of the International Harvester Company, with a total capital of $120,000,000, Mr. Lane appeared before the board of directors and offered to sell the Milwaukee Harvester Company plant as a going concern, including its bills receivable and the plants of the McCormick Harvesting Machine Company, the Deering Harvester Company, the Plano Manufacturing Company, and the Warder, Bushnell & Glessner Company, [illegible]0,000,000 of working capital, to be repre- [illegible] and bill[illegible]able of the McCormick [illegible] Harvester Com- [illegible]ompany, or in cash,

for the $120,000,000 of the capital stock of the company, and on August 13, 1902, this proposition was accepted. The property turned in was of greater value than the stock issued for it. This case, therefore, involves no question of over-capitalization.

In pursuance of this agreement there was turned over to the company $40,000,000 of the bills receivable of the McCormick Harvesting Machine Company, the Deering Harvester Company, and the Plano Manufacturing Company, guaranteed by them, respectively. In all Mr. Lane did in this matter he was acting upon the suggestion of his counsel, Messrs. Guthrie, Cravath & Henderson. He was compensated, but there never was any idea upon his part that he owned any of the properties. He was a mere conduit or instrumentality in the transaction.

The International Company shortly acquired all the stock of the Milwaukee Harvester Company, as it had already acquired the plant. It reduced the capital of the Milwaukee Harvester Company to $1,[991]000,000, and changed the name to the International Harvester Company of America, hereafter called the America Company. It was for a considerable time officered by the same men who held the offices of the International Company. A contract was entered into between the International Company and the America Company by which the former contracted to sell to the latter its entire output and the latter undertook the responsibilities of reselling the same. The America Company, in addition to buying the manufactured products of the International, bought from outside parties some threshers, wagons, plows, etc., and resold them; but the dealing in all property not the product of the International Company only amounts to about 2½ per cent of its business. All the stock of the America Company is still the property of the International Company.

The two defendant railroads are switching roads to the factories of the International Company; one acquired in the consolidation mentioned, and one constructed by the new company. The International Flax Twine Company, the Wisconsin Steel Company, and the Wisconsin Lumber Com-

pany are auxiliary companies of the International Company, and the personal defendants are officers and directors of the last-named company.

It is alleged in the petition that these five companies produced over 85 per cent of all harvesting machinery sold in the United States, and it is admitted in the answer that said companies produced approximately 80 to 85 per cent of the binders, mowers, reapers, and rakes.

In January following the consolidation of the five companies, the International Company acquired the D. M. Osborne & Co. stock, and the companies thus combined manufactured a still greater percentage of the harvesting machinery used in the United States and nearly the whole of that exported from the United States. The five companies except the Milwaukee Company all took stock in the new company and, with the exception of the Warder, Bushnell & Glessner Company, took stock for the entire amount of property turned over by them, and this amounted to $93,400,000 of the $120,000,000 capital of the new company; $6,600,000 of the capital of the new company was paid to J. P. Morgan & Co., of which $3,148,196.66 was for the Milwaukee Harvester Company's property and business, and $3,451,803.34 was for services and expenses in connection with the organization of the International Company. Thus $100,000,000 of the capital of the new company was clearly covered, without any new or additional working capital. By agreement among all the parties who were to receive shares of stock in the International, all the stock except enough to qualify directors was vested in voting trustees, namely, George W. Perkins, Cyrus H. McCormick, president of the McCormick Harvesting Machine Company, and Charles Deering, of the Deering Harvester Company. These voting trustees were maintained for ten years.

The day of the transfer to the International Harvester Company of the five plants, Cyrus H. McCormick, Harold F. McCormick, Stanley McCormick, all of the McCormick Harvesting Machine Company, and Cyrus Bentley, the Chicago attorney of the company; Charles [992] Deering, William Deering, James Deering, and Richard F. Howe, all

of the Deering Harvester Company; John J. Glessner, of the Warder, Bushnell & Glessner Company; and William H. Jones, of the Plano Manufacturing Company, were all chosen directors of the International Harvester Company and constituted the majority of the board.

When the D. M. Osborne & Co. purchase was made, while the International bought all the stock, it permitted the Osborne Company to continue to appear to be independent. It is claimed that this was done to enable the Osborne to collect its bills receivable, which were not acquired by the International. There was commercial advantage in claiming not to be associated with the International. Many persons were opposed to buying from it, and for two years the Osborne Company persistently advertised that it was independent.

While under the old-time law of warranty it might be justifiable for the Osborne Company to conceal its relations with the International, there can be no excuse for the affirmation upon its part that it was independent after it had been acquired by the International.

"The seller may let the buyer cheat himself ad libitum, but must not actively assist him in cheating himself." 1 Parsons on Contracts (9th ed.) page 615.

The International had bought all the stock of the Osborne Company, and it had been transferred to a trustee for it, and there was, in the fact that the Osborne Company might better collect its bills receivable, no basis to justify the International in making a contract under which the Osborne Company could continue to advertise falsely that it was an independent concern when it had in fact been merged with the International. It is safe to say that from January, 1903, the competition of the Osborne Company was in name only and did not exist in fact.

What has been said of the Osborne purchase is true in principle of purchases made by the International of the Keystone Company, the Minnie Harvester Company, and the Aultman-Miller plant.

Prior to the consolidation the first five companies were in fierce competition for trade, and especially was this true of

the McCormick and the Deering Companies, and this competition extended, not only to price, but to the granting of expert assistance and numerous free items with machines. The result of the combination was that all this competition at once wholly ceased, except within the limits of agents' commissions.

The defendants claim that the objects of the organization were:

First, to build up the foreign trade;

Second, by the combination to secure more capital to enable them to continue the battle in the foreign market;

Third, by enlarging the scope of the business so as to include other lines of agricultural implements to make an all the year around business;

And that it was not the intention to oppress the domestic market and that they have not done so.

It does appear that since the combination the foreign trade has been greatly increased. This trade of all the combining companies was [993] $10,400,000 in 1902 and has grown under the defendants' management to $50,000,000 in 1912. This vast growth is to the credit of the energy and enterprise of the defendants. But the growth of the trade of the companies who formed the combination was at the time of the consolidation very recent and the trade was rapidly increasing just prior to the combination. With the knowledge that the foreign trade was making such a remarkable growth at the time of the consolidation whether the separate companies would have increased their business as much as the defendants have done is a mere matter of speculation, on which we can venture no opinion.

It is claimed that the consolidation brought $60,000,000 of available cash to the new company with which to expand the foreign trade. This is not true. The Government claims that not more than $10,000,000 of new cash was furnished, but in no event did it exceed $20,000,000. Forty million dollars of this so-called working capital was furnished in bills receivable of the old companies, just as available to the old companies as to the new; and $60,000,000 was issued for the tangible property of the old companies and the expenses

of J. P. Morgan & Co. in connection with the organization of the new company, and for the Milwaukee Company.

Soon the International began buying and constructing plants to extend its business from the prior one of the manufacture of harvesting machinery to the manufacture of all of the five classes of agricultural implements heretofore referred to. Consequently a distinction is drawn in argument between what are called the old lines and the new.

It is contended by the Government that the International used its prior monopoly of the old lines to impose its new lines upon dealers and it includes this among numerous charges of oppression upon purchasers.

While the evidence shows some instances of attempted oppression of the American trade by the International and the America Companies, such cases are sporadic, and in general their treatment of their smaller competitors has been fair and just, and if the International and America Companies were not in themselves unlawful there is nothing in the history of the expanding of the lines of manufacture so as to make an all the year around business that could be condemned.

[1] The real question is whether the combination of the companies was illegal in the beginning, or became so with the additions subsequently made.

This court is clearly of the opinion that the process by which it was made to appear that the properties were sold to Lane was merely colorable.

Parts of sections 1 and 2 of the Sherman Law are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part [994] of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

The question is whether the combination was illegal under this statute.

Opinion of the Court.

This statute must be construed in the light of reason. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States* v. *American Tobacco Co.*, 221 U. S. 106, at page 180, 31 Sup. Ct. 632, 648 (55 L. Ed. 663).

In the latter case the Supreme Court said:

"Coming then to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because although it was held in the Standard Oil case that, giving to the statute a reasonable construction, the words 'restraint of trade' did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute, and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute."

[2] No weight is attached therefore to the means by which the combination was formed if a combination within the purview of the statute was created. That it was a combination of five companies is clear. The fact that this combination took the form of a new corporation is immaterial. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632. 55 L. Ed. 663; *United States* v. *E. I. Du Pont De Nemours & Co.* (C. C.), 188 Fed. 127.

Was this combination in restraint of trade? It substantially suppressed all competition between the five companies, and the restraint of competition between combining companies is as illegal as destruction of competition between them without combining.

In *United States* v. *E. I. Du Pont De Nemours & Co.*, 188 Fed. 127, in an able opinion by Lanning, circuit judge, in behalf of Circuit Judges Gray, Buffington, and himself, it is said:

Opinion of the Court.

"A number of bills were introduced in the Fiftieth Congress (in August and September, 1888), designed to make unlawful every combination 'to prevent competition' and 'to prevent full and free competition' in the sales of articles transported from one State to another. None of them was enacted into law. On December 4, 1889, Mr. Sherman introduced into the Senate of the Fifty-first Congress a bill which declared unlawful every combination 'to prevent full and free competition' in such sales. After much debate the bill was, on March 27, 1890, referred to the Committee on Judiciary, and on April 2, 1890, that committee reported it back to the Senate with an amendment, drawn by the late Senator Hoar, striking out all after its enacting clause and substituting therefor the act as we now have it. As enacted, it does not condemn every combination 'to prevent competition.' What it condemns is every combination in restraint of trade or commerce among the several States, etc. **[995]** When the bill went from the Senate to the House, the latter body amended it by inserting a provision extending the scope of the act to all agreements entered into for the purpose of 'preventing competition' either in the purchase or sale of commodities; but the amendment was disagreed to. While there is a 'general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body' (*United States* v. *Freight Association*, 166 U. S. 318, 17 Sup. Ct. 540, 41 L. Ed. 1007), that rule 'in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted' (*Standard Oil Co.* v. *United States*, 221 U. S. 50, 31 Sup. Ct. 512, 55 L. Ed. 619 [34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734], decided May 15, 1911).

"There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the Anti-Trust Act was passed, a definite legal signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town engaged in the same business as competitors may unite in a copartnership, and thereafter, as between themselves, substitute coöperation for competition. Their combination restrains competition, and if their town is located near the line between two States, and each has been trading in both States, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several States.' To

Opinion of the Court.

what extent the Anti-Trust Act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

"The recent decisions of the Supreme Court in *Standard Oil Co.* v. *United States*, and *American Tobacco Co.* v. *United States*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, make it quite clear that the language of the Anti-Trust Act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the Anti-Trust Act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common-law restraint of trade. This fact was plainly recognized in *United States* v. *Joint Traffic Association*, 171 U. S. 505, 567, 19 Sup. Ct. 25, 31, 43 L. Ed. 259, where Mr. Justice Peckham said:

"'We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, a manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within the legal definition of that term.'

"While all this is true, the recent decisions of the Supreme Court make it equally clear that a combination cannot escape the condemnation of the Anti-Trust Act merely by the form it assumes or by the dress it wears. It matters not whether the combination be 'in the form of a trust or otherwise,' whether it be in the form of a trade association or a corporation, if it arbitrarily uses **[996]** its power to force weaker competitors out of business, or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes or attempts to monopolize a part of that commerce, in a sense that violates the Anti-Trust Act."

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16, 15 Sup. Ct. 249, 255 (39 L. Ed. 325), Chief Justice Fuller said:

"Again, all the authorities agree that in order to vitiate a contract — combination it is not essential that its result should be a complete — is sufficient if it really tends to that end and to deprive s which flow from free competition."

And this was reiterated in *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 237, 20 Sup. Ct. 96, 44 L. Ed. 136.

In *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 454 (48 L. Ed. 679), it is said:

"We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are: * * * That railroad carriers engaged in interstate or international trade or commerce are embraced by the act; that combinations, even among *private* manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act; that Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce."

In *United States* v. *Reading Co.*, 226 U. S. 324, 370, 33 Sup. Ct. 90, 103 (57 L. Ed. 243), it is said:

"Whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. *United States* v. *St. Louis Terminal Association*, 224 U. S. 383, 394 [32 Sup. Ct. 507, 56 L. Ed. 810]; *Swift & Co.* v. *United States*, 196 U. S. 375 [25 Sup. Ct. 276, 49 L. Ed. 518].

"In the instant case the extent of the control over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the extent of the control acquired over the independent output which constituted the only competing supply, affords evidence of an intent to suppress that competition, and of a purpose to unduly restrain the freedom of production, transportation, and sale of the article at tide-water markets.

"The case falls well within, not only the Standard Oil and Tobacco cases [221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663], but is of such an unreasonable character as to be within the authority of a long line of cases decided by this court. Among them we may cite: *Northern Securities Co.* v. *United States*, 193 U. S. 197 [24 Sup. Ct. 436, 48 L. Ed. 679]; *Swift & Co.* v. *United States*, 196 U. S. 375 [25 Sup. Ct. 276, 49 L. Ed. 518]; *National Cotton Oil Co.* v.

Opinion of the Court.

Texas, 197 U. S. 115 [25 Sup. Ct. 379, 49 L. Ed. 689]; *United States v. St. Louis Terminal Association*, 224 U. S. 383 [32 Sup. Ct. 507, 56 L. Ed. 810]; and the recent case of *United States v. Union Pacific Railway*, 226 U. S. 61 [33 Sup. Ct. 53, 57 L. Ed. 124]."

[997] In *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 648 (55 L. Ed. 663), it is said:

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term 'restraint of trade' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract and render difficult, if not impossible, any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade, which, on the very face of the act it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from and the promotion of the wrongs which the statute was intended to guard against, which would result from giving to the statute a narrow, unreasoning, and unheard of construction, as illustrated by the record before us, if possible, serves to strengthen our as to the correctness of the rule of construction, the rule

of reason, which was applied in the Standard Oil case, the application of which rule to the statute we now, in the most unequivocal terms, re-express and re-affirm."

In *Nash* v. *United States*, 229 U. S. 373, 376, 33 Sup. Ct. 780, 781 (57 L. Ed. 1232), referring to the Standard Oil and American Tobacco Co. cases, it is said:

"Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent *or the inherent nature of the contemplated acts*, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

In *United States* v. *Freight Association*, 166 U. S. 290, 339, 17 Sup. Ct. 540, 558 (41 L. Ed. 1007), the court said:

"The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition, the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement [998] to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it."

In *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865, the Supreme Court held a certain lease valid so far as the mere power to execute it was concerned, but that it became invalid when it tended directly and in a substantial manner to suppress competition under the common law, the Sherman Anti-Trust Law and the laws of Oklahoma. The decision was upon the sole ground of the undue suppression of competition.

[3] Suppression of competition, where the parties to a combination control a large portion of the interstate or foreign commerce in the article, and where there is no obligation to form the combination arising out of the fact that the parties to the same are losing money, or the like, has been held an undue restraint of trade. See *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; Id., 148 Fed. 939, 78 C. C. A. 567, 19 L. R. A.

(N. S.) 143; *Swift & Co.* v. *United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *United States* v. *Addyston Pipe Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241; *City of Atlanta* v. *Chattanooga Foundry*, 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721; *Montague* v. *Lowrey*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

In the *United States* v. *Standard Oil Co.* (C. C.) 173 Fed. 177, 184, Sanborn, Circuit Judge, in behalf of himself, Van Devanter, then Circuit Judge, now a Justice of the Supreme Court, and Adams, Circuit Judge, said:

"The purpose of this statute was to keep the rates of transportation and the prices of articles in interstate and international commerce open to free competition. Any contract or combination of two or more parties, whereby the control of such rates or prices is taken from separate competitors in that trade and vested in a person or an association of persons, necessarily restricts competition and restrains that commerce. * * * Agreements of competitive manufacturers and traders not to compete in the purchase or sale of articles in interstate commerce, or to buy or to sell them at prices fixed by a mutual agent or association, * * * are alike declared to be illegal by this law. In the construction and enforcement of this statute, corporations are persons, they are legal entities distinct from their stockholders, and the combination of two or more of them in restraint of trade is as unlawful as the combination of individuals."

In *United States* v. *Addyston Pipe Co.*, 85 Fed. 271, 282, 29 C. C. A. 141, 151 (46 L. R. A. 122), Taft, Circuit Judge, speaking for Circuit Justice Harlan, the writer of the opinion, and Lurton, Circuit Judge, late a Justice of the Supreme Court, in an opinion exhaustive in its review of foreign and State decisions, quotes with approval from the opinion of Chief Justice Tindal in *Horner* v. *Graves*, 7 Bing. 735, the following:

"We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the [999] interests of the public. Whatever restraint is larger than the necessary protection of the party

requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

In the *United States* v. *American Tobacco Co.* (C. C.) 164 Fed. 700, 702, 703, in an opinion by Lacombe, Circuit Judge, on behalf of himself and Coxe and Noyes, Circuit Judges, it is said:

"What benefits may have come from this combination, or from the others complained of, it is not material to inquire, nor need subsequent business methods be considered, nor the effects on production or prices. The record in this case does not indicate that there has been any increase in the price of tobacco products to the consumer. There is an absence of persuasive evidence that by unfair competition or improper practices independent dealers have been dragooned into giving up their individual enterprises and selling out to the principal defendant. * * *

"During the existence of the American Tobacco Company new enterprises have been started, some with small capital, in competition with it, and have thriven. The price of leaf tobacco—the raw material—except for one brief period of abnormal conditions, has steadily increased until it has nearly doubled, while at the same time 150,000 additional acres have been devoted to tobacco crops and the consumption of the leaf has greatly increased. Through the enterprise of defendant and at large expense new markets for American tobacco have been opened or developed in India, China, and elsewhere. But all this is immaterial. Each one of these purchases of existing concerns, complained of in the petition, was a contract and combination in restraint of a competition existing when it was entered into, and that is sufficient to bring it within the ban of this drastic statute."

In *State* v. *International Harvester Co.*, 237 Mo. 369, 394, 141 S. W. 672, 677, the court said:

"In the case at bar we are to take the acts of the parties and judge their purpose by the consequence that would naturally result. When men deliberately and intelligently go to work and acquire power that will enable them to control the market, if they choose to exercise it, there is no use for them to say that they did not intend to control the trade or limit competition, nor when the legality of their act of acquisition is in question is it any use for them to say, 'We have not used the power to oppress any one.'"

[4] We think it may be laid down as a general rule that if companies could not make a legal contract as to prices or as to collateral services they could not legally unite, and

as the companies named did in effect unite, the sole question is as to whether they would have agreed on prices and what collateral services they could render, when their companies were all prosperous and they jointly controlled 80 to 85 per cent of the business in that line in the United States. We think they could not have made such an agreement. *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; Id., 148 Fed. 939, 78 C. C. A. 567, 19 L. R. A. (N. S.) 143; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Swift & Co.* v. *United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

If the five companies which formed the International had been small, and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in restraint of trade, but in the furtherance of it; but when they constituted the largest manufacturers of [1000] their articles in America, if not in the world, and held jointly about 80 to 85 per cent of the trade, and two at least of the companies forming the combination were prosperous, their combining was, when similarly viewed, an unreasonable restraint of trade. If the business of the separate companies combining was unsuccessful, it could be claimed that their combination was reasonable, in view of the rule of reason as proclaimed by the Supreme Court; but it is conceded that the McCormick and the Deering Companies "had established reasonably successful and prosperous businesses," so that question is eliminated.

There is no limit under the American law to which a business may not independently grow, and even a combination of two or more businesses, if it does not unreasonably restrain trade, is not illegal; but it is the combination which unreasonably restrains trade that is illegal, and if the parties in controversy have 80 or 85 per cent of the American business, and by the combination of the companies all competition is eliminated between the constituent parts of the combination, then it is in restraint of trade within the meaning of the statute, under all of the decisions.

The International is not only a great manufacturing company, but by the American Company is a great dealer in agricultural implements in interstate and foreign commerce, and so the case comes more nearly within the ruling in *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, than *United States* v. *Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325.

It seems proper to call attention to the fact that all commerce is classified as intrastate, interstate, or foreign; both the first and second sections of the Sherman Law treat interstate and foreign commerce as separate and distinct entities. Foreign commerce is as distinct from interstate commerce as interstate commerce is distinct from intrastate commerce. Each is a unit. While intrastate commerce is within the control of the States, interstate and foreign commerce are both within the control of the United States, but as separate entities or units. The Congress has condemned any combination in restraint of either the foreign or the interstate trade, and if the International Harvester Company was in restraint of either the interstate or foreign trade it was unlawful. It would not be lawful to restrain the interstate trade in order to build up the foreign trade. The International, by suppressing all competition between the five original companies, was in restraint of trade as prohibited in the first section of the Sherman Law, and it tended to monopolize within the meaning of the second section of the same law, and this restraint and this monopoly were the direct and immediate effect of the consolidation, and were not incidental and uncertain in their effect.

In *Standard Sanitary Manufacturing Co.* v. *United States of America*, 226 U. S. 20, 49, 33 Sup. Ct. 9, 15 (57 L. Ed. 107), the court said:

"The Sherman Law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

"This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to pre[1001]vent evasions of its policy 'by resort to any disguise or subterfuge of form,' or the escape of its prohibitions 'by any indirection.' *United States* v. *American*

Tobacco Co., 221 U. S. 106, 181 [31 Sup. Ct. 632, 649 (55 L. Ed. 663)]. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be of some good results. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290 [17 Sup. Ct. 540, 41 L. Ed. 1007]; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 62 [28 Sup. Ct. 428, 52 L. Ed. 681]."

We conclude that the International Harvester Company was from the beginning in violation of the first and second sections of the Sherman Law, and that this condition was accentuated by the reorganization of the America Company and by the subsequent acquisitions of competing plants, and that all the defendant subsidiary companies became from time to time parties to the illegal combination, and the defendant companies are combined to monopolize a part of the interstate and foreign trade. It will therefore be ordered that the entire combination and monopoly be dissolved, that the defendants have 90 days in which to report to the court a plan for the dissolution of the entire unlawful business into at least three substantially equal, separate, distinct, and independent corporations, with wholly separate owners and stockholders, or in the event this case is appealed and this decree superseded, then within 90 days from the filing of the procedendo or mandate from the Supreme Court the defendants shall file such plan, and in case the defendants fail to file such plan within the time limit the court will entertain an application for the appointment of a receiver for all the properties of the corporate defendants, and jurisdiction is retained to make such additional decrees as may become necessary to secure the final winding up and dissolution of the combination and monopoly complained of, and as to costs.

Hook, Circuit Judge (concurring):

I concur in the foregoing opinion. The International Harvester Company is not the result of the normal growth of the fair enterprise of an individual, a partnership, or a corporation. On the contrary, it was created by combining five great competing companies which controlled more than 80 per cent of the trade in necessary farm implements, and

it still maintains a substantial dominance. That is the controlling fact; all else is detail. No one who has studied with an open mind the history of the Sherman Act and the atmosphere in which it was framed can reasonably doubt that it was not born of a mere concern over prices in dollars and cents, but that it was also directed at the creation of artificial barriers across the avenues of industry, deemed destructive of the opportunity, initiative, and independence of those who come after, and therefore against the common good. And the remedy prescribed was prohibition. It may be, as is said, that there is a growing recognition of of the need of great concentrated resources for trade and commerce, even though secured by combination of independent, competing concerns. But that is not the Sherman Act. And a statute must be taken by the courts as a true estimate of that preponderance of public opinion which calls for legislative expression. It is not for them to question whether that [1002] opinion was rightly weighed or interpreted, whether it is wise or unwise, or whether it has since changed. The intent of a statute at its passage must continue. It does not automatically adjust itself to the variations of the public pulse, and a judicial adjustment would be an usurpation. In our National Government such things are for Congress alone.

It is but just, however, to say and to make it plain that in the main the business conduct of the company toward its competitors and the public has been honorable, clean, and fair. Some petty dishonesties were tracked in at the start, mostly by subordinates who had been in the service of the old companies, but they were soon gotten rid of. In this connection it should also be said that specific charges of misconduct were made in the Government's petition, which found no warrant whatever in the proof. They were of such a character and there was so much of them, apparently without foundation, that the case is exceptional in that particular.

SANBORN, Circuit Judge (dissenting):

It is the opinion of the majority of the court that the property and the foreign and interstate business of the In-

ternational Company must be divided into at least three substantially equal and independent parts, or placed in the hands of a receiver under a decree of this court, because in 1902 five companies theretofore engaged in the manufacture and sale of harvesting machinery, controlling about 85 per cent of the interstate and foreign trade therein, combined in the International Company, ceased and have not since resumed competition among themselves. With profound respect for their judgment, I find myself forced to dissent from it: (1) Because it seems to me to give insufficient consideration to the trade conduct of the defendants at the time this suit was commenced in April, 1912, and for seven years before that date; (2) because the crucial issue in this case is not whether or not in 1902 or 1903 the defendants or their predecessors, by reason of the suppression of competition between five or more companies, made a combination or an attempted monopoly in restraint of trade, but it is whether or not ten years afterwards, in 1912, when the complaint in this suit was filed, the International Company and the other defendants were then unduly or unreasonably restraining or monopolizing interstate or foreign trade, or threatening so to do; and (3) because the evidence in this case has forced upon my mind the deep and abiding conviction that, for at least seven years before the commencement of this suit, the defendants had not been, and then were not, either so doing or threatening so to do.

1. Conceding, but not admitting, that if the combination of 1902 and 1903 had been challenged in 1903 or 1904, before the actual effect of the conduct of its business by the defendants upon interstate and foreign trade had been demonstrated by the actual trial of it from 1905 to 1912, a court might have presumed that the defendants were violating the Anti-Trust Law, and have so found on the theory that those who have power to violate a law are presumed to do so, yet the demonstration by actual trial, which the evidence seems to me to present, that at the time this suit was commenced the defendants were, and for [1003] at least seven years before that time had been, conducting the business of the International Company and their business without

unduly restraining or monopolizing interstate or foreign trade ought to, and in my opinion must, far outweigh that questionable presumption. I say questionable presumption, because while it was invoked to sustain the view of the majority of the Supreme Court in that case in which they declared that the prohibition of the Anti-Trust Law was not limited to restraints of and attempts to monopolize interstate and foreign trade that were deleterious to the public and unreasonable, but embraced every direct restraint, whether beneficial or injurious to the public, and whether reasonable or unreasonable (*Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291, 25 Sup. Ct. 493, 49 L. Ed. 739), and while it has been since cited in some cases, doubtless in deference to its citation in that case, it flies in the face of the basic principle of civil government and the indispensable and indisputable rule of law and of action that all persons are presumed to obey the laws and to discharge their legal and moral duties until the contrary is proved (*Cole* v. *German Savings & Loan Society*, 124 Fed. 113, 119, 59 C. C. A. 593, 63 L. R. A. 416; *American Bridge Co.* v. *Seeds*, 144 Fed. 605, 609, 75 C. C. A. 407, 11 L. R. A. [N. S.] 1041), and it is contrary to the universal experience of mankind, for persons who acquire the power to violate laws, whether against murder, or arson, or larceny, or undue restraints of trade, or unreasonable monopolies, or other forbidden acts, generally obey those laws and fail to exercise their power to violate them. This alleged presumption never seemed well founded or reasonable to me, and now that the rule of reason must be applied to the interpretation of the Anti-Trust Law and to its application to the facts of each particular case, as well as to other laws and to the facts of other cases (*Standard Oil Co.* v. *United States*, 221 U. S. 1, 64, 67, 68, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663), I think this alleged presumption should be deemed functus officio.

2. The controlling issue in this case is not what combination or monopoly was made in 1902, 1903, or 1904, nor whether or not that combination was violative of the Anti-Trust Law. It is: Were the defendants in 1912 doing or threatening to do acts which so unreasonably restrained or monopolized interstate or foreign trade that it is the duty of this court of equity to enjoin and prevent their future performance? Sections 1 and 2 of the Anti-Trust Law forbid combinations and monopolies in undue restraint of interstate or foreign trade, and prescribe punishment by fine or imprisonment, or both, for any violation thereof; and section 725 of the Revised Statutes (U. S. Comp. St. 1901, p. 583) bars any prosecution under these acts for such violations three years after they are committed. 26 Stat. 209, c. 647, §§ 1, 2, and 4; Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725); 3 Comp. St. 3200 and 3201; 1 Comp. St. 725, § 1044. If, therefore, a combination or monopoly, in unreasonable restraint of trade, was made in [1004] 1902, 1903, or 1904, the proceedings to punish for the making thereof were barred many years before this suit was commenced.

Section 4 of the act gives jurisdiction to this court "to prevent and restrain violations of this act," but it grants this court no power to punish past violations thereof. This suit is not a proceeding to punish the defendants for deeds done in the past. It is a suit in equity under section 4 to prevent and restrain future violations of the Anti-Trust Law. It looks to the future, not to the past, and this court is not only without jurisdiction to punish defendants for past violations of this law, but persons who at some past time combined to unreasonably restrain or monopolize interstate or international trade were not thereby deprived of their right thereafter and now to conduct such trade in obedience to the law. *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Comm.*, 200 U. S. 361, 404, 26 Sup. Ct. 272, 50 L. Ed. 515; *United States* v. *Standard Oil Co.* (C. C.), 173 Fed. 177, 190, 191. This suit, therefore, is nothing more than an appeal to the consciences of the members of this court of equity to prevent and enjoin

future violations of this law by the defendants, and under familiar principles of equity jurisprudence no such restraint, injunction, or other relief may be lawfully granted here, unless the particular facts proved in this individual case clearly show that the defendants were violating or threatening to violate this Anti-Trust Act when this suit was commenced.

3. The particular facts proved in this individual case not only fail to show that the defendants were unduly or unreasonably restraining or attempting to monopolize interstate or foreign trade, or threatening so to do at the time this suit was commenced and for seven years before that time, but they establish the converse.

That the Anti-Trust Law is but the embodiment and application to interstate and foreign trade of the ancient English rule of public policy against undue and unreasonable restraints of trade and unreasonable monopolies, that it does not forbid all restraints upon such trade or all attempts to monopolize it, nor all restrictions of competition therein, but those only which are unreasonably injurious to the public, that the reason for and the purpose of the Anti-Trust Act are the same as the reason for and the purpose of that English rule of public policy, that the test and standard by which to determine whether or not the defendants in any case are unreasonably restraining or monopolizing interstate or foreign trade is the same which had been applied under the English rule of public policy for years before this Anti-Trust Act was enacted, and that, as Chief Justice White said, "the statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint," are now rules of interpretation and application of this law conclusively established by the repeated decisions of the highest judicial tribunal in the land. *Standard Oil Co. v. United States*, 221 U. S. 1, 60, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [1005] (N. S.)

834, Ann. Cas. 1912 D, 734; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663. Trade is the making and enforcing of contracts. And it necessarily follows, from the rule laid down in the excerpt just quoted from the opinion of the Chief Justice, that the Anti-Trust Act evidenced the intent not to restrain, and that it does not restrain, the trade or business of the defendants, "whether resulting from combination or otherwise," unless that trade or business is conducted by methods which constitute an interference which is an undue restraint of interstate or foreign commerce.

It is equally well established that the reason for the prohibition by the English rule of public policy and by the statute under consideration of unreasonable restraints of and attempts to monopolize trade was and is that, by unduly restricting competition, they are injurious to the public in that (1) they raise the prices to the consumers of the articles they affect, (2) limit their production, (3) deteriorate their quality, and (4) decrease the wages of the labor and the prices of the materials required to produce them. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 52, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. Undue injury in the ways just stated to the public (that is to say, to the consumers and makers of the articles produced or sold) is the basis and reason for the prohibition and the test of undue or unreasonable restraint or attempt to monopolize. And if in any individual case the weight of the evidence fails to prove that the defendants' conduct of their business is so restricting or threatening to restrict competition in the articles they make or sell as to unduly injure the public by (1) raising the prices of the articles to the consumers, or (2) limiting their production, or (3) deteriorating their quality, or (4) decreasing the prices paid for the labor or materials required to produce them, or (5) by unfair and oppressive treatment of competitors, neither undue nor unreasonable restraint of competition, nor of trade, nor undue attempt to monopolize is established. The reason for the rule and for the prohibition in the law does not exist, and the law is inapplicable. "Cessante ratione, cessat ipsa

lex." *Green v. Liter*, 8 Cranch, 229, 249, 3 L. Ed. 545. Such a case the evidence in this case seems to me to present.

Counsel for the Government recognize the fact that it was essential to the grant of the relief they sought that they should plead and prove that, at the commencement of this suit, the defendants were committing, and threatening to commit, the acts constituting undue restriction of competition, undue restraint of trade, and undue attempt to monopolize trade which have been recited, and they alleged that they were committing them in their complaint. The main charge in their pleading was that the defendants between 1903 and April 30, 1912, had, by means of the International Company, unduly restricted competition in the manufacture and sale of harvesting machinery, drawn to itself the business therein, excluded other manufactures and dealers therefrom, and that they threatened to continue so to do. The evidence, however, seems to me to have established the following facts which, in my judgment, prove the contrary:

[1006] The amount of the domestic sales of the old lines claimed to have been monopolized (that is to say, of the harvesting machinery) by the five companies whose business was acquired by the International Company in 1902 was $46,142,158.64 in that year. The amount of the domestic sales of like machinery by the International Company in 1903 was $37,763,858.55, a decrease of 18.16 per cent; in 1904 it was $32,337,917.32, a decrease in the two years of 29.92 per cent; in 1905 it was $30,999,632.59, a decrease in the three years of 32.82 per cent; and in 1912 it was only $39,062,455.36, which was 15.34 per cent less than the amount of the domestic sales of the combining companies in 1902.

The average yearly acreage and production of small grain in the United States during the ten years prior to 1913 was greater than during the nine years prior to 1903. But the yearly average domestic sales of the International Company of all agricultural machinery, including both the old lines charged to have been monopolized and the new lines, such as harrows and cultivators, during the ten years prior to 1913, was $46,810,067, which was more than a million dollars less than the domestic sales of the vendor companies in 1902.

In 1903 the International Company sold 98.15 per cent of the binders sold in the United States; in 1912 only 85.04 per cent thereof. In 1903 the International Company sold 92.05 per cent of all the mowers sold in the United States; in 1912 only 72.98 per cent thereof. In 1903 the International Company sold 84.91 per cent of the rakes sold in the United States; in 1911 it sold 67.79 per cent thereof.

The average number of binders sold in the United States yearly by the five combining companies during the five years prior to 1902 was 152,364; the average number sold yearly by the International Company during the first ten years of its existence was 91,465.

In 1903 the International Company had five competitors, who in that year sold in the United States 1,960 binders, while in 1912 these competitors sold 15,631 binders and three new competitors sold 3,979. In 1903 eight competitors of the International Company sold in the United States 17,985 mowers, and in 1912 these and six other competitors sold 60,816. In 1903 ten competitors of the International Company sold in the United States 27,753 rakes, and in 1911 these and five other competitors sold 42,723, while the International Company sold 157,160 in 1903 and only 89,912 in 1912. In 1901 and 1902, in the section of Nebraska south of the Platte River, the combining companies sold substantially all the binders, but in 1912 the evidence tends to show that their competitors sold about one-half the binders sold in that country.

During all of the ten years prior to 1913 the International Company has had active and successful competitors in the manufacture and sale of harvesting machines, and during those years new competitors have established themselves in the business and become successful. Among its competitors in the manufacture and sale of harvesting machinery are the Acme Company, which entered the field in 1907 or 1908, which makes harvesting machinery only, which conducts a growing and successful business, and which sold in the United [1007] States 11,400 harvesting machines in 1908 for $779,672 and 31,000 harvesting machines in 1912 for $2,100,000; Deering & Co., with an issued capital stock of over $50,000,000, which sold 490 mowers in

1906 and 7,314 in 1911; the Johnston Harvester Company, with an issued capital stock of $1,800,000, whose sales of binders increased from 1,002 in 1903 to 3,027 in 1911, whose sales of mowers increased from 2,527 in 1903 to 7,026 in 1911, whose sales of corn binders increased from 528 in 1903 to 3,150 in 1911, and whose sales of rakes increased from 1,855 in 1903 to 5,200 in 1911; the Independent Harvester Company, which entered the field with the manufacture of 954 mowers and 135 binders in 1910 and increased its output to about 2,700 mowers and about 1,900 binders in 1912; the Wood Mowing & Reaping Company and several others, while the J. I. Case Threshing Machine Company, with an issued capital stock of $20,000,000, was constructing, when this suit was commenced, a large plant to manufacture a binder to be sold in competition with those of the International Company. The foregoing facts portray the course of the business in the old lines. In the new lines scores of companies and tens of millions of dollars of capital were and are engaged in active and successful competition with the International Harvester Company. The facts which have been recited, and other facts and circumstances to the same effect, seem to me to establish the conclusion that, during the ten years of the operation of the International Harvester Company, neither it nor the defendants were, nor are they, drawing to it its competitors' share of the interstate trade in harvesting machinery or excluding them therefrom, and that, on the other hand, the International Company's proportion of this trade has been decreasing and that of its competitors increasing.

Counsel for the Government charged that the defendants bought factories and failed to operate them in order to restrain and monopolize the trade, but the proof was that they operated every factory they purchased. And the purchase of factories and the organization and operation of subsidiary companies to produce or prepare the raw materials needed for the manufacture of their machines, or to manufacture new lines of implements, was a just and lawful method of conducting their business and tended not to restrain but to promote trade and competition.

Sanborn, C. J., dissenting.

If competition is desirable, the entry of a new competitor into any line of manufacture or trade is ordinarily lawful and must be generally beneficial.

The Government charged that the defendants systematically bought up patents on and inventions of harvesting machinery in order to make or perpetuate a monopoly in the trade in it. But the proof was that the defendants have no patents upon any parts of any of their harvesting machines, and that any manufacturer is free to make and sell any or all parts of them in competition with them.

Counsel for the Government alleged that the defendants reduced the prices of its machines in certain localities in order to drive competitors out of the trade, and increased their prices in other localities to make up the loss, and that it committed many oppressive and un[1008]just acts to restrict competition and monopolize trade. Volumes of evidence were taken regarding these averments. The conduct of the business of the defendants for years in all parts of the land were searched and proved. Among the innumerable acts of the defendants and their agents in conducting their vast business for a decade, the Government found some that were unfair to competitors, but they were either unauthorized acts of subordinate agents or sporadic and exceptional instances. The weight of the evidence of the officers and agents of their competitors who came in large numbers to testify, and of all the witnesses upon the subject, is so overwhelming that the general conduct and the almost universal practice of the defendants and their agents was and is free from all methods and acts either unlawful, unfair, or oppressive towards their competitors, that it has left no doubt that the consistent and persistent purpose, policy, rule of action, and practice of the defendants has been and is to avoid and prevent all acts and methods unfair, unjust, or oppressive towards their competitors, to leave competition with them free, to give to them full and fair opportunities to secure shares of the trade and business in which they are all engaged, and to carry on their own trade honestly, justly, and fairly.

During the ten years from 1902 to 1912 there was a general and substantial rise in the prices of machinery and

commodities of nearly all kinds in the United States. Harvesting machines were improved and made more durable and efficient. But their prices to the consumers remained nearly stationary, and increased far less than the prices of other agricultural machinery the trade in which was not claimed to have been restrained or monopolized. The chief harvesting machine was the binder. Its price advanced about 5 per cent during some of the intermediate years, but was substantially the same in 1912 for a better machine than it was for a poorer machine in 1902, while the prices of cultivators, wagons, and plow goods, which were certainly not monopolized, advanced from 10 to 30 per cent.

The Government charged that the defendants monopolized the trade in binder twine and increased its price to the consumers, but the proof was that in 1912 the inmates of two States' prisons and fourteen other competitors were selling binder twine; that one of them, the Plymouth Cordage Company, sold 100,000,000 pounds of it in that year, while the International Company sold only 112,000,000 pounds in the United States and 22,000,000 pounds in Canada; and that the price of binder twine decreased from 11 cents a pound in 1902 to 7¼ cents a pound in 1912. Meanwhile the cost of the raw material required to make harvesting machines advanced and the wages of the labor required to construct them increased from 20 to 30 per cent.

So it is that the evidence has convinced me that at least for seven years before this suit was commenced, and at that time, the defendants were neither unduly restricting competition in the manufacture or sale of the machinery and articles in which they were dealing or drawing to themselves an undue share of the business therein, or excluding other manufacturers and dealers therefrom, or practicing acts unjust or unfair to, or oppressive of, their competitors, or threatening **[1009]** so to do; that they were not injuring the public by raising the prices to the consumers of the articles in which they dealt or limiting the production thereof, or deteriorating their quality, or decreasing the wages of the laborers employed to make them, or the prices paid for the materials required to construct them, or threat-

ening so to do; but that they were doing the opposite of these things. And the acts of the defendants and the proved effect of their acts during at least seven years before this suit was commenced, to my mind, demonstrate the fact that they were neither unduly nor unreasonably restraining or attempting to monopolize interstate or foreign trade in the articles they made and sold, and that they and their case fall far without the prohibition of the Anti-Trust Law and the reason for it.

4. The only reason for the prevention or restraint of acts of defendants in a suit under the fourth section of the statute is, as we have seen, that they are or threaten to be unduly injurious to the public. If they are not thus injurious, or if they are beneficial, and such restraint or prevention of their acts would be injurious to the public, they should not be restrained or prevented. The defendants claim that the main purpose of the combination of 1902 and 1903 was to develop the foreign trade in American harvesting machines; that that development could not be successfully made without a much larger capital than any of the combining companies possessed; and that the cessation of competition among the combining companies was merely incidental to the acquisition of the capital requisite to accomplish that purpose. The facts in this case are so clear that the purpose and intent of the defendants are not material. The prevention or restriction of their acts by the decree of a court of equity is always a matter within the sound judicial discretion of the chancellor or chancellors composing the court, and, while in exercising this discretion the rules of law and the facts already stated seem to me to be decisive, the following are not altogether unworthy of consideration. The proof is that during the ten years preceding 1913 the International Company at great expense taught the people of foreign countries the use of American harvesting machinery, and developed the foreign trade therein in such a way that, while in 1902 the sales in foreign trade of machines, repairs, and twine by the companies whose business was acquired by the International Company amounted to about $10,400,000, the sales of the International Company in the foreign trade

gradually increased until in 1912 they amounted to $50,896,000, and so that, while in 1903 the domestic sales of that company were 76.5 per cent, and its sales in the foreign trade were 23.5 per cent, of its total sales, in 1912 its domestic sales were 55.7 per cent, and its sales in the foreign trade 44.3 per cent, of its total sales. The employment of the necessary American laborers and salesmen at the increasing wages the defendants have paid and are paying to make and to sell in other lands these machines and the purchase at the increasing prices paid of the materials to construct this vast volume of machinery unavoidably tends to increase the wages of the laborers and the prices of the materials, and hence to benefit the public, and any receivership or sub-division of the property and the business of **[1010]** these defendants can not fail to tend to cripple and diminish this business, to restrain the advance, or to decrease the wages of the laborers and the prices of the materials required to carry it on, and thereby to inflict injury upon the public.

Again, the combination denounced and the International Company, in which it was embodied, have been in existence, and that company and the other defendants had been conducting their business, for almost ten years before this suit was commenced. If the making of that combination was originally a violation of the Anti-Trust Act, the prosecution of the defendants at law under sections 1 and 2 of the Anti-Trust Act for that violation was barred many years before this suit was commenced. It is a general rule of equity jurisprudence that the courts of chancery will apply the doctrine of laches in analogy to the limitation of like actions at law. Conceding that this rule does not control this suit because mere delay does not bar a sovereignty from sustaining a suit in equity to maintain and enforce its equitable rights, nevertheless, when a sovereignty submits itself to a court of equity and prays its aid, its claims and rights are, and ought to be, judicable by the general principles and rules of equity applicable to the claims and rights of private parties under like circumstances. *State of Iowa* v. *Carr*, 191 Fed. 257, 266, 112 C. C. A. 477, and cases there cited. It is a maxim of equity jurisprudence that, as Lord

Camden said in *Smith* v. *Clay*, 3 Brown's Chancery, 639: "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence." The business of the International Company gradually increased during nearly ten years after the formation of the combination assailed until that business reached the vast volume indicated at the time this suit was commenced. Its business was conducted openly without legal challenge or attack, so far as this record shows, during all these years, and it is not improbable that many parties hold stock of the International Company which they purchased during these ten years in reliance upon these facts, the value of which a decree against the defendants will greatly depreciate. So it is that in any event this suit does not appeal to the conscience of a chancellor with the force it might have had in 1903 or 1904 before the actual conduct of the business of the defendants had demonstrated its innocuous effect and no parties had been induced to act in reliance upon its freedom from attack.

5. The evidence in this suit seems to me to present a new case under the Anti-Trust Law. No case has been found in the books, and none has come under my observation, in which the absence of all the evils against which that law was directed at the time the suit was brought, and for seven years before, was so conclusively proved as in this suit, the absence of unfair or oppressive treatment of competitors, of unjust or oppressive methods of competition, the absence of the drawing of an undue share of the business away from competitors and to the defendants, the absence of the raising of prices of the articles affected to their consumers, the absence of the limiting of the product, the absence of the deterioration of the quali[1011]ty, the absence of the decrease of the wages of the laborers and of the prices of the materials, the absence, in short, of all the elements of undue injury to the public and undue restraint of trade, together with the presence of free competition which increased the share of the competitors in the interstate trade and decreased the share of the defendants. Neither the Standard Oil Co. case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, nor the American To-

bacco Co. case, 221 U. S. 106, 108, 31 Sup. Ct. 632, 55 L. Ed. 663, nor any other authority cited, seems to me to rule this case, because in none of them was there such affirmative and, to my mind, conclusive evidence that for years before the suits were commenced the defendants had practiced no acts and pursued no methods which constituted an undue restraint of trade or an unreasonable attempt to monopolize it.

And because in this suit this court is without power to punish past violations of the Anti-Trust Law, and the limit of its jurisdiction is to prevent and enjoin future acts violative thereof, because the making of the combination of 1902 and 1903, whether violative of the Anti-Trust Law or not, did not deprive the defendants of their right thereafter and now to conduct their business in obedience to that law, because the question in this case is not whether or not the combination of 1902 and 1903 was violative of that law, but it is whether or not in April, 1912, when this suit was commenced, the defendants were unduly or unreasonably restraining or attempting to monopolize interstate or foreign trade, because it was not the effect of the Anti-Trust Law, nor was it the intent of the Congress which passed it, to prohibit all restriction of competition or all restraints of interstate or foreign trade or all attempts to monopolize parts of it, but only those restraints and attempts to monopolize which are unduly injurious to the public by (1) raising the prices to the consumers of the articles they affect, (2) limiting their production, (3) deteriorating their quality, (4) decreasing the wages of the laborers and the prices of the materials required to produce them, or (5) practicing unfair and oppressive treatment of competitors, because the evidence has convinced me that for at least seven years before this suit was commenced, and at that time, the defendants were not injuring the public by unduly or unreasonably restricting competition in the manufacture or sale of the machinery or articles which they were making and selling, or by drawing to themselves an undue share of the business therein, or by excluding other manufacturers or dealers therefrom, or by practicing acts unjust or unfair to, or oppressive of,

their competitors, that they were not injuring the public by raising the prices to the consumers of the articles they made or sold, or limiting their production, or deteriorating their quality, or decreasing the wages of the laborers employed to make them, or the prices paid for the materials required to construct them, that they were not threatening to do these things, but they were doing the opposite of these things to the substantial benefit of their competitors, of the consumers of their products, of the laborers who make them, the men who furnish the material for [1012] them, and the public in general, because the acts of the defendants during these seven years do not constitute that undue or unreasonable restraint of or attempt to monopolize interstate or foreign trade forbidden by the Anti-Trust Act, and because, in my opinion, the prevention or restraint of these acts or this business of the defendants, or the splitting of their business and property into three or more independent parts, or the seizure of it by a receiver, by virtue of a decree of a court of equity, would not tend to prevent undue restraint of, or undue attempts to monopolize, interstate or foreign trade, but, on the other hand, would tend to produce or foster the very evils at which the Anti-Trust Act was leveled, to wit, the restriction or lessening of competition, the increase of the prices of the machinery and articles affected, the deterioration of their quality, the limitation or reduction of the product and the diminution of the wages of the laborers making them and of the prices of the materials required to produce them to the substantial injury of the public, I am unable to concur in the opinion or the decree against the defendants in this case. In my opinion, a decree should be rendered that the complaint in this suit be dismissed without prejudice to the right of the United States to bring another suit of like character against any of the defendants whenever any of them is found to be engaged in the commission of any acts in violation of the Anti-Trust statute.

Syllabus.

UNITED STATES *v.* PRINCE LINE, LIMITED, ET AL.[a]

SAME *v.* AMERICAN-ASIATIC S. S. CO. ET AL.

(District Court, S. D. New York. February 3, 1915.)

[220 Fed. Rep., 230.]

MONOPOLIES 16—RESTRAINT OF TRADE—AGREEMENT BETWEEN SHIP OWNERS—REASONABLENESS.—An agreement between all the ship owners engaged in the same trade as to the number of vessels each should operate, the dates of sailings, exchange of freight between lines, and rates of freight, made for the purpose of assuring shippers regular sailings and affording them a fair rate so that they might meet the competition of trade from other countries, is not in itself an unreasonable restraint of trade contrary to the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. 16.]

MONOPOLIES 16—STATUTES—CONSTRUCTION.—The construction that the Sherman Anti-Trust Act prohibits only unreasonable restraint of trade is the same when applied to acts of common carriers as when applied to others.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. 16.]

SHIPPING 147—FREIGHT RATES—REASONABLENESS—OCEAN CARRIERS.—Regular rates for the ocean carrier trade are not unreasonable because at particular times or places tramp steamers are willing to cut them greatly in order to secure a cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 500, 506, 507; Dec. Dig. 147.]

MONOPOLIES 16—RESTRAINT OF TRADE—REBATE—EXCLUSIVE CONTRACTS.—The practice of a combination of ocean carriers to give rebates to all shippers who ship exclusively by their lines, which tended to secure more regular cargoes and to enable the carriers to anticipate the needs of the trade, is not an unlawful restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. 16.]

MONOPOLIES 24—INJUNCTION—REFUSAL OF ACCOMMODATIONS.—Where there was evidence, in proceedings by the United States to dissolve a combination of ocean carriers under the Sherman Anti-Trust Act, that one of the members of the combination had refused to carry a

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[a] For opinion of Supreme Court (242 U. S., 537), see *post*, page 684.

[b] Syllabus copyrighted 1915, by West Publishing Company.

Statement of the Case.

cargo for a certain shipper when there was unengaged space on its vessels, an injunction will be issued against the combination and its members to prohibit such practice in the future.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

[231] MONOPOLIES 24—RESTRAINT OF TRADE—REASONABLENESS.—A violation of the Sherman Anti-Trust Act is not established unless there is some proof of actual unreasonable interference with the natural course of trade, and, where neither carrier nor shipper complain, it may be inferred that there is no unreasonable restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig § 17; Dec. Dig. 24.]

MONOPOLIES 24—INJUNCTION—FIGHTING SHIPS.—Where a conference agreement between ocean carriers contained a provision for "fighting ships," but there was no evidence that one had ever been used, no injunction will be granted against that practice.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

Separate suits under the Sherman Anti-Trust Act by the United States of America against the Prince Line, Limited, and others, and against the American-Asiatic Steamship Company and others, to dissolve certain alleged unlawful combinations and to enjoin certain practices of the respective companies. Bill against the Prince Line, Limited, and others dismissed, except as to the injunction against a certain practice; and that against the American-Asiatic Steamship Company and others dismissed.

The records are separate, but both causes were heard on the same day and may conveniently be discussed in a single opinion. In each cause the petition alleges that for some years defendants have been engaged in an unlawful conspiracy to restrain trade and destroy competition in ocean carriage between ports in the United States and specified foreign ports, and to monopolize such trade. The relief prayed is that each of these alleged unlawful combinations be declared illegal, and that certain of their practices in conducting the business of their respective combinations be enjoined.

In United States v. Prince Line, Limited, et al.:

Ernest E. Baldwin and *Stanley D. Montgomery*, Sp. Asst. Attys. Gen., and *H. Snowden Marshall*, U. S. Atty., of New York City, for the United States.

Convers & Kirlin, of New York City (*J. Parker Kirlin* and *Mark W. Maclay, jr.*, both of New York City, of counsel), for defendants Prince Line, Limited, and others.

Burlingham, Montgomery & Beecher, of New York City (*Charles C. Burlingham*, *Charles Burlingham*, and *Roscoe H. Hupper*, all of New York City, of counsel), for defendants Lamport & Holt, Limited, and others.

Spooner & Cotton, of New York City (*John C. Spooner*, of New York City, of counsel) for defendants Hamburg-American Line and others.

In United States v. American-Asiatic S. S. Co. et al.:

Ernest E. Baldwin and *Stanley D. Montgomery*, Sp. Asst. Attys. Gen., and *H. Snowden Marshall*, U. S. Atty., of New York City, for the United States.

Burlingham, Montgomery & Beecher, of New York City (*Charles C. Burlingham*, *Charles Burlingham*, and *Roscoe H. Hupper*, all of New York City, of counsel), for defendants American-Asiatic S. S. Co. and others.

John C. Spooner, of New York City, for defendant Hamburg-American Line.

Convers & Kirlin, of New York City (*J. Parker Kirlin* and *Mark W. Maclay, jr.*, both of New York City, of counsel), for defendants Dodwell & Co., Limited, and others.

Before LACOMBE, COXE, WARD, and ROGERS, Circuit Judges.

PETITION AGAINST PRINCE LINE AND OTHERS.

LACOMBE, Circuit Judge.

The combination against which this proceeding is directed, composed of two British and two German steamship companies, has been practically dissolved as a result of the

European war. In consequence the questions here presented have become largely academic, and it seems unnecessary to undertake any ex[232]haustive discussion of the facts. A brief statement of the propositions contended for and of our disposition of them will be sufficient.

[1] The combination, while it existed, was the well-known sort not infrequently found among ocean carriers, where two or more ship-owners agree together as to the number of vessels they will operate in a particular trade, as to number of voyages to be made between specified ports, as to dates of sailings, as to exchange of freight to be carried when the vessel of one or another line has her space engaged or it is more convenient to use one vessel instead of another, as to rates of freight, etc. The fundamental question is whether what has been done by the parties to the combination has operated an unreasonable restraint of trade, or has resulted in a monopolization of trade between the ports specified within the terms of the Sherman Anti-Trust Act.

[2] Preliminary to that question, however, there is submitted a proposition advanced by the Government to the effect that the later decisions of the Supreme Court, in cases like the *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and *United States* v. *American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, have no application in this litigation because the defendants are common carriers. We find no authority in the reports, nothing in the text of the act, nor in the congressional proceedings which accompanied its passage, to support the proposition that the act is to have one construction when defendants are manufacturers, merchants, or traders, and another and different one when they are common carriers. The acts of these defendants are to be considered in the light of the construction which has been given to the act by the Supreme Court irrespective of their particular vocation.

The commerce affected is that between New York and New Orleans and certain ports in Brazil; coffee mainly this way, products of the United States out. These exports from

the United States are in competition with similar exports from Europe to Brazil, an older trade and a larger one. At the time it was formed the parties were in the trade and handled all the trade there was. No one was frozen out by their combination and there was no greater monopoly than existed before. Indeed, there is less of a monopoly now than there was then, since a new independent carrier, the Lloyd Braziliano, has come in as a competitor. Some of these defendants operated, or were in competition with, some of the foreign lines which handled the competing commerce from Europe to Brazil. Their story of the genesis of their combination, here complained of, is this: The object was to give regular and sufficient service at stated intervals, so that there would not be an overplus of vessels one month and a scant supply the next month; to have regular sailing dates known far in advance so that shippers could make firm contracts for future deliveries; to give merchants an opportunity of changing their engagements from one line to another as convenience required; to develop outports and to give an opportunity to low classes of cargo to get regular transportation; to establish uniform rates of freight, uniform so far as the several [233] lines were concerned, although naturally liable to change from time to time; and to establish rates so as to meet the European rates, fixed by combinations whose business is not regulated by statute. Counsel for the Government questions these statements on the ground that they assume "purely altruistic motives." We do not agree. Of course, the object was not altruistic; the defendants wished primarily to make money for themselves; there is no sentiment in business; but they reasoned, no doubt, that if they kept their rates so regulated in coordination with European rates as to give a United States shipper reasonable assurance as to what he had to meet in competition and a fair parity as to rates, and also gave him proper and sufficient sailings with opportunity of changing engagements, the trade would be stimulated, would grow more readily than under the old uncertain conditions, and with its growth the combination would gather in its share of the financial results. The event seems to have justified

their expectations. In the mere initiation and carrying out of the enterprise outlined above we see no unreasonable or abnormal restraint of trade.

[3] It is contended that the rates charged by the combination have been unreasonable. Examination of the testimony does not persuade us to this conclusion. Conditions of carriage on the ocean are peculiar. Its waterways are open to all. Tramps and chartered vessels may pass from port to port without acquiring franchises or condemning rights of way. In one sense, as a witness graphically expressed it, "ocean freights are as unstable as the water itself." Regular rates, normally reasonable, are not to be held unreasonable because at some time and place one or more tramp steamers are willing to cut them deeply rather than sail to their next port in ballast. A test sometimes used when inquiring into reasonableness of rates is the cost of service. Thus tested, the evidence indicates that the rates charged by the combination, regulated as they were in coordination with European rates, as a rule covered merely cost of service and a reasonable profit; indeed, a small profit, for the competing line, which shaded down defendant's rates very little, ran frequently at a loss. Testing the rates by comparison with general ocean freights leads to a similar conclusion; such increase of rates as there has been from time to time seems to have been entirely normal following the upward movement of general ocean freight rates.

[4] It is contended that the system of rebates adopted by the combination was a restraint of trade. Rebates at a stated percentage were given to exclusive shippers. Their payment was deferred so that it could be determined at the close of a rebate period whether the shipments of the concern asking for it had really been exclusive. It is, of course, desirable for a shipper to know in advance what rates he is to be charged; in like manner, it is desirable for a carrier to know as definitely as it can what amounts of cargo it may expect it will have to handle in a given period. These rebates were not secret, nor were they confined to a favored few; they were uniform, were open to all, and all were invited to avail of them. The arrangement is probably as old as trade itself. One natural result of it would seem

to be stability in sailings and service—both desirable for trade—which might not otherwise be maintained.

[234] If the price of a unit of cargo space be assumed to be 50 cents, the 10 per cent rebate brings it down to 45 cents. Since the line has been doing business with the 10 per cent rebate, it must be assumed that (in the case taken as an illustration) 45 cents per unit is remunerative; that it covers cost and a reasonable profit. It does not seem to us, however, necessarily to follow that the 45 cents would be remunerative if it were not coupled with the agreement for exclusive shipments. A line providing regular sailings and undertaking to furnish sufficient space will presumably learn by experience enough of conditions at the several ports at different seasons to enable it to calculate with reasonable accuracy what amount of cargo it may expect from its shippers for any particular sailing. Making provision accordingly, the vessel sailing will take her departure with substantially a full cargo. But if, when she reaches port, it is discovered that the calculations as to expected cargo were correct, but that some of her largest regular shippers had sent their merchandise off the week before by some tramp steamer, the regular vessel will have to sail with much unfilled cargo space. A few experiences of this sort might well involve a loss equal to, if not in excess of, the 10 per cent. We think the two things, rebate and exclusive shipments, are so closely and normally coupled together that in substance the situation is the same as it is when a lower price per unit is quoted for large shipments than for small ones. Such differentiation of price charged between large and small shipments is not unreasonable. *Int. C. C.* v. *B. & O. R. R.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699.

[5] It is charged that defendants have refused to carry cargo at their own berth rates, when there was unengaged space in their vessels. There is no attempt to prove this against all the defendants. Between one of them and the single shipper who makes the charge there was generated from prior transactions, occurring before the combination, a degree of heat, which has probably warped the testimony on both sides as to this refusal. The one side, admitting

refusal in a few instances, asserts that there was not unengaged space at the time of refusal, an assertion not necessarily proved false by the vessel's subsequently sailing with some free space; prior engagements may have been canceled. Witnesses for the shipper admit that their tenders of cargo were in the hope of "making out a case," either for action for treble damages or the initiation of this suit by the United States. The evidence is generally unsatisfactory, and it is hard to say where the truth lies; but, on the whole, we are inclined to condemn such practices by granting an injunction against the combination of defendants and its component members prohibiting refusal to receive cargo offered at their regular rates, unless for good cause shown.

In view of the fact that the logic of events has turned this investigation into an autopsy instead of a determination of live issues, it seems unnecessary to discuss the persuasiveness of the proofs offered to show that the percentage of outward cargo from the United States carried by defendants grew from 51 per cent in 1908 to 54.7 per cent in 1912.

There may be a decree for injunction as indicated supra, without costs; in all other respects the bill is dismissed.

[235] PETITION AGAINST AMERICAN-ASIATIC COMPANY.

[6] This is a suit, similar to the one above considered, brought under the Sherman Anti-Trust Act against a combination of the ocean steamship lines running from New York and Boston to ports in the Far East and return. There are 11 corporations defendant—8 British, 2 United States, and 1 German. The acts complained of are the usual ones—conferences, agreements, pooling arrangements, regulation of number of vessels employed, of ports visited, and of sailing dates, regulation of rates, provisions for rebates—not secret but open to all and uniform, etc. All of these, or some of them, it is contended, constitute a restraint of trade and an attempt to monopolize under the act. From a study of the multitudinous decisions, not always harmonious, construing this act, the conclusion is reached that a violation of the act is not made out by

theories of what will be the result upon trade and commerce of agreements entered into by defendants, or upon presumptions as to what may have been done under such agreements. Some actual unreasonable interference with the natural course of trade must be shown by proof.

In most, if not in all, cases of this character, many of the witnesses called by the Government necessarily come from the offices of the defendants. From them only can it be best established what agreements were made and what action under such agreements was taken by the parties thereto. In all cases to which attention has been called, however, this testimony is supplemented by other evidence given by witnesses who complain of some injury; some one asserts that the rates charged him are excessive, or that his business has been in some way interfered with or harassed or hampered by defendant's conduct.

No such witness has appeared in this case; no ship-owner, no shipper or consignee, no manufacturer, merchant, or trader, large or small, in the United States or in the Far East, is here with any complaint. Persons engaged in the trade which, it is alleged, is restrained, sit mute; every one seems to be reasonably well satisfied with existing conditions except the Government, which contends that the agreements themselves, carried out according to their terms, constitute a violation of the act, i. e. (as it is now construed), that they evidence an "unreasonable restraint of trade." It further suggests as a reason for dissolving the combination that, when the Panama Canal is in full operation, "there is no reason to suppose that traffic through (it) would escape the domination of defendants, if they were able to control it."

When from carriers and former carriers and prospective carriers of merchandise between the specified ports, and from persons interested in the manufacture, transportation, sale, and purchase of such merchandise, there comes no complaint, it seems a fair inference that whatever restraints may have resulted from defendant's combination and conduct are merely the usual, normal, and reasonable restraints against which it has been held the Sherman Act is not directed.

Syllabus.

[7] Defendant's conference agreement contains a provision for "fighting ships." If there were evidence that any steps had ever been taken towards putting one on, we should be inclined to grant an injunc[236]tion similar to the one we granted in *United States* v. *Hamburg American Co. et al.* (D. C.), 216 Fed. 971; but, since there is no such evidence in this case, we see no reason for granting that relief.

The bill is dismissed as to all the defendants. All concur.

UNITED STATES *v.* AMERICAN-ASIATIC STEAMSHIP COMPANY ET AL.[a]

UNITED STATES *v.* PRINCE LINE, LIMITED, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 138, 169. Motions to reverse and remand with instructions to dismiss petitions without prejudice. Submitted December 4, 1916.—Decided January 22, 1917.

[242 U. S., 537.]

The agreements between British, German, and American steamship companies which were assailed as contrary to the Anti-Trust Act of July 2, 1890, having necessarily been dissolved by the European War, and the questions raised by the bills having thereby become moot when the decrees of the court below were entered, the decrees are reversed and the cases remanded with directions to dismiss the bills without prejudice—as in *United States* v. *Hamburg-American Co.*, 239 U. S. 466.[b]

220 Fed. Rep. 230, reversed.

The case is stated in the opinion.

The Solicitor General and *Mr. Assistant to the Attorney General Todd* for the United States, in support of the motions.

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[a] For opinion of the district court (220 Fed. Rep. 230), see *ante*, page 675.

Opinion of the Court.

Memorandum opinion by Mr. Chief Justice WHITE, by direction of the court.

The United States sued to restrain the carrying out of agreements between British, German, and American steam- [538] ship companies who were defendants, on the ground that they were in violation of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209. Overruling the contention that that act did not relate to contracts concerning ocean carriage, the court entered decrees against the United States in both cases dismissing the bills for want of equity on the ground that the assailed agreements were not in conflict with the Anti-Trust Act except as to a particular discrimination found to have been practiced in one of the cases which was provided against. 220 Fed. Rep. 230. At the time this action was taken by the court below, as the result of the European War, the assailed agreements had been dissolved and the questions raised by the bills were therefore purely moot, as directly decided to be the case as to a similar situation in *United States* v. *Hamburg-American Co.*, 239 U. S. 466.

Under these circumstances the request now made by the United States that the doctrine announced in the Hamburg-American case be applied to both of these cases and the relief afforded in that case be awarded, is well founded and must be granted. It follows, therefore, that the decrees below must be reversed and the cases be remanded to the court below with directions to dismiss the bills without prejudice to the right of the United States in the future to assail any actual contract or combination deemed to offend against the Anti-Trust Act.

And it is so ordered.

Syllabus.

UNITED STATES v. UNITED SHOE MACHINERY CO. OF NEW JERSEY ET AL.[a]

(District Court, D. Massachusetts. March 18, 1915.)

[222 Fed. Rep., 349.]

MONOPOLIES 14—COMBINATIONS IN RESTRAINT OF TRADE—MANUFACTURERS OF PATENTED ARTICLES.—The union in one corporation of a number of others, each of which had been engaged in the manufacture of patented non-competing machines, but which were used successively in a manufacturing business, is not a combination in restraint of trade, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820).[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. 14.]

MONOPOLIES 14—"COMBINATION IN RESTRAINT OF TRADE"—CONSOLIDATION OF SHOE MACHINERY COMPANIES.—The United Shoe Machinery Company was formed by the consolidation of a number of companies, each engaged in making patented machines for use in the manufacture of shoes, for the most part non-competing. During the ensuing 11 years it also acquired the patents, property, and business of a considerable number of other manufacturers of different classes of machinery, all of which was used in the manufacture of shoes, and comprising a group of machines covering practically all of the operations required in such manufacture, by which means the company obtained a very large percentage of the trade in such machinery, although it appeared that neither its property nor its business was acquired by unfair means, but, on the contrary, that in most cases its purchases from [350] others were made at their solicitation, and that in many more cases it refused to buy the business of others which was offered. *Held*, that such facts did not characterize the company as a "combination in restraint of trade," or evidence an attempt to create a monopoly, within the meaning of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. 14.

For other definitions, see Words and Phrases, First and Second Series, Combination in Restraint of Trade.]

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[a] The case is pending in the Supreme Court, on the appeal of the United States.

See *U. S.* v. *Winslow* (195 Fed. 578), *ante*, page 170; (227 U. S., 202), *ante*, page 198. See also later cases (227 Fed. 507), *post*, page 784; (234 Fed. 127), *post*, page 791.

MONOPOLIES 14—ANTI-TRUST ACT—MANNER OF CONDUCTING BUSINESS.—Neither is illegality of the company's business shown by the fact that, instead of selling its machines, it leases the same for long terms, with a license for the terms of any patents covering parts thereof, for a royalty based on the number of pairs of shoes on which they are used, with a provision requiring the lessee to use the machines to their full capacity so far as its business warrants, nor because of further provisions, in some of the leases of certain machines, requiring the lessee to also lease other related machines from the company under penalty of cancellation of the lease, where such clause was optional with the lessee, who was charged a smaller royalty when it was included.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. 14.]

In Equity. Suit by the United States against the United Shoe Machinery Company of New Jersey and others. Decree for defendants.

See, also, 198 Fed. 870.

James A. Fowler, Asst. Atty. Gen.; *William S. Gregg*, Sp. Asst. Atty. Gen.; *Asa P. French*, U. S. Atty.; *Edwin H. Abbot, jr.*, Sp. Asst. U. S. Atty; and *Allen Webster*, Sp. Asst. U. S. Atty., all of Boston, Mass., for the United States.

Frederick P. Fish, *Charles F. Choate, jr.*, *William A. Sargent*, *Malcolm Donald*, *Harold G. Donham*, *Walter B. Farr*, and *Lafayette R. Chamberlin*, all of Boston, Mass., for defendant.

Before PUTNAM and DODGE, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge.

Of course, a proceeding on the criminal side of the court cannot operate as an estoppel in a civil proceeding; but it may be referred to safely in an introductory way, and in explanation of questions of law to be relied on.

The general features of this case are largely stated in *United States* v. *Winslow*, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481, and *United States* v. *Winslow* (D. C.) 195 Fed. 578; but there are differences, so that we will quote extensively from the bill in the present suit.

Opinion of the Court.

In so much of the bill as relates to the organization, we have no occasion to make any distinction between the United Shoe Machinery Company and the United Shoe Machinery Corporation, two New Jersey organizations who are made respondents; and we do not know that we will have occasion to refer to the subordinate organizations made respondents and known as the United Shoe Machinery Company of Maine, etc.

[351] The bill alleges the organization of the United Shoe Machinery Company of New Jersey, as follows:

"Defendants Sidney W. Winslow, William Barbour, Elmer P. Howe, John H. Hanan, George E. Keith, Edward P. Hurd, George W. Brown, Wallace F. Robinson, Rudolph Matz, and others, owners, officers, directors, and agents of said Goodyear Shoe Machinery Company, International Goodyear Shoe Machinery Company, Goodyear Shoe Machinery Company of Canada, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, Eppler Welt Machine Company, International Eppler Welt Machine Company, and Davey Pegging Machine Company, not being satisfied with the benefit of the lawful monopolies and rights belonging to them under letters patent of the United States and of other countries, which they had enjoyed for many years, pertaining to shoe machinery and parts thereof, and designing and intending unduly, unreasonably, and unlawfully to extend, expand, and perpetuate said monopolies and rights, and to enhance the value thereof at the expense of the boot and shoe manufacturers and of the public generally, and to use the same as a means for unlawfully controlling interstate and foreign trade and commerce in shoe machinery to a greater extent than was warranted by said letters patent, determined to acquire a complete monopoly of the manufacture, sale, and lease of shoe machinery, destroy existing competition among the manufacturers and dealers in such machinery, and through unlawful combinations and agreements to exclude all others from said trade and commerce. For the accomplishment of this purpose they conceived the idea of acquiring the ownership or control of all concerns engaged in manufacturing and dealing in any and all kinds of shoe machinery, and then to refuse to sell or lease any of the essential machines to the manufacturer of shoes, except on condition that he buy or lease of them practically all other machinery of whatever kind necessary or useful to such manufacturer of shoes, and thereby to exclude all competition by other manufacturers of such shoe machinery and to monopolize the trade and commerce therein among the States and foreign countries. The various contracts, combinations, conspiracies, and acts hereinafter described were steps in carrying out the above mentioned unlawful project. A preliminary agreement was made, and in

Opinion of the Court.

February, 1899, they incorporated United Shoe Machinery Company, under the laws of New Jersey, with an authorized capital of $25,000,000 ($12,500,000 preferred, $12,500,000 common), with broad powers under its charter to manufacture, buy, sell, lease, operate, and deal in and with all kinds of machinery, tools, and implements, and especially in everything in any way connected with or used in the manufacture of boots and shoes. For the stock allotted to each, and for cash, at values far in excess of real worth, four of the old concerns, to wit, Goodyear Shoe Machinery Company, International Goodyear Shoe Machinery Company, Consolidated & McKay Lasting Machine Company, and McKay Shoe Machinery Company, conveyed to the new corporation, as going concerns, their business of manufacturing, selling, leasing, and dealing in shoe machinery, including their letters patent of the United States and of other countries, and all property and rights used in connection therewith, wherever situated, and their principal owners, managers, directors, and officers became managers, directors, and officers in the new company. Stock of the new company was allotted and received as follows."

At this point the bill shows the distribution of the shares of capital stock of the new corporation among the prior corporations combined in it, or their shareholders. It alleges that the prior corporations conveyed to the new corporation their business, patents, and property rights "for the stock allotted to each and for cash, at values far in excess of real worth." No proof was offered in support of this final allegation, and it has not been insisted upon by the United States.

The bill proceeds:

"Prior to the organization of United Shoe Machinery Company of New Jersey, boot and shoe manufacturers, purchasing or leasing machines from one [352] of the aforesaid companies, were not compelled to use exclusively machines mentioned in the aforesaid groups manufactured by either of the other companies. For example, the shoe manufacturer who held lasting machines under lease from the Consolidated & McKay Lasting Machine Company was not required to use, in connection with that company's lasting machines, welt-sewing machines or outsole-stitching machines of the Goodyear Shoe Machinery Company, or those of any other company, and he was free to obtain such machines wherever he could procure them to the best advantage. The same was true of the trade in welt-sewing machines and outsole-stitching machines, heeling machines, and metallic fastening machines. Defendants, however, not being satisfied or contented with said portion of the trade and commerce in shoe machinery which they acquired through the organization of United Shoe Machinery

Opinion of the Court.

Company of New Jersey, and with the intent to acquire complete control of the business of manufacturing and selling or leasing of shoe machinery among the States and with foreign countries, to exclude all others therefrom, to enhance the cost of said machines to users thereof, and to wrong and to oppress the public, discontinued the sale to boot and shoe manufacturers of each and all of the machines included in said groups of machines, and unlawfully devised, adopted, and put into effect arbitrary, oppressive, and unreasonable lease and license agreements, which boot and shoe manufacturers have been and are required to agree and conform to in order to obtain from said defendants any of the machines included in said groups."

On the whole, as the case developed, no objection was persisted in by the United States to the fact that the policy of the Shoe Machinery Company was to lease its machines instead of selling them. It was plain that this policy was not injurious in a large sense. It enabled manufacturers of small and moderate means to embark in manufacturing to an extent which would have been impossible for them, if they had been obliged to purchase machinery, because many machines are so expensive as to lock up capital and render it dead for practical purposes of financing shoe manufacturing. It is also apparent that a portion of the conditions and provisions of leases were in use without complaint before the United Shoe Company was organized; but it is not necessary that we should detail these facts, because we must take the result of the development as to this topic, at least, as it was found at the time the bill was filed in 1911, and, while the prior condition might mitigate any complaint on that point, it cannot answer it.

The bill further proceeds as follows:

"These agreements contain provisions, not found in their former lease and license agreements, which compel boot and shoe manufacturers leasing any of such machines from defendants to agree to use exclusively one or more of the classes of machines included in said groups of machines owned and controlled by them, upon penalty of having all the machines included in said groups so leased to them by defendants immediately reclaimed and taken away and the lease and license agreements canceled. These contracts further require boot and shoe manufacturers to take each of said machines for a period of not less than 17 years, regardless of the terms of the patents relating thereto. Lessees thereunder are compelled to obtain all duplicate parts, extras, mechanisms, and devices of every kind needed or used in

operating, repairing, or renewing the leased machinery from defendants, at exorbitant prices fixed by them from time to time. Many of these agreements further provide that the lessee shall, at the expiration of 17 years, and after he has paid large royalties throughout that period, if he shall then have no further use for the machines, return the same to defendants at their factory at Beverly, Mass., and shall pay to them a return charge, which in some cases amounts approximately to the original cost of building the machines. Defendants have continually, persistently, and arbitrarily enforced the provisions of said lease and license agreements by all the means in their power as against **[353]** the boot and shoe manufacturers, and have made it their general policy and practice to refuse to furnish such machines to any and all boot and shoe manufacturers who fail to comply with the terms or spirit of the provisions of said lease and license agreements, and to otherwise injure them.

"Defendants, in pursuance of their general purpose, inserted in and made a part of each lease and license agreement provisions reserving to themselves the right to forthwith terminate and cancel all existing lease and license agreements between them and the boot and shoe manufacturers, if the latter should fail or cease to use exclusively and to their full capacity machines leased or controlled by defendants, thereby prohibiting said manufacturers, not only from using competing shoe machinery manufactured in the United States, but also from using any such machinery manufactured in foreign countries and imported here for sale or lease."

There is no proof that the United Shoe Company has enforced its leases in any arbitrary or unreasonable manner. On the whole, it seems to have been moderate with reference to such enforcements, and the number of cases in which anything in the way of a forfeiture has been demanded has been so small that, on looking over the great mass of the operations of the United Shoe Company, such enforcements have been so few as to be practically negligible, and there is no evidence that the duplicate parts, extras, and other incidentals furnished by the United Shoe Company have been sold at exorbitant prices fixed by it, or that the cost involved in the return of machinery has in any way approximated its original cost, unless, possibly, in some exceptional instances which have not caught the eye of the court. We do not think the case as developed has turned on these particular allegations.

It might have been expected in a proceeding of this importance, involving so many aspects, that the parties would

not, at all times, have been in accord as to the pleadings of the United States. Referring to the allegation that the respondents "conceived the idea of acquiring the ownership or control of all concerns engaged in manufacturing and dealing in any and all kinds of shoe machinery," the utmost that the case can in any event be said to show is a purpose to acquire control of certain machinery connected with bottoming shoes, or later of certain clicking or eyeletting machines; and of this the United States became during the trial so far satisfied that it asked permission to amend the above allegation accordingly. On the rules of equity pleading, however, which also are applied to some extent to pleadings at common law, an allegation of the whole field covers any part of it, and may be accepted as such without involving any variance.

Allegations such as the following, which run through these pleadings, color them all, and are to be accepted as controlling the entire bill, namely:

"Not being satisfied with the benefit of the lawful monopolies and rights belonging to them under letters patent of the United States;" "and intending unduly, unreasonably, and unlawfully to extend, expand, and perpetuate said monopolies and rights."

The bill in the same line claims that the alleged confederates had, from the outset of the confederation, taken certain action described in the bill for the purpose of perpetuating the rights they had under existing patents after those patents should expire. We are dealing [354] now with allegations which seem to assert that the machines acquired by the corporation on its organization were covered by patents, and that its then purpose was to maintain this position, even after the then existing patents expired. This supports the proposition of the respondents that the machinery offered by the respondents was at all times protected by patents succeeding each other. At any rate, it must be accepted that, from the beginning, the machinery offered by the respondent corporation was, in all its essential elements, protected by patents, and that there has been no proof to the contrary. So that, for the purposes of this case, the machinery has been mainly, if not entirely, of that character.

To prevent possible misunderstanding of the position of the respondents in reference to the fact that the Shoe Machinery Company's machines are protected by patents, we repeat and accept what the respondents say, as follows:

"The extent and character of the rule of property established by the patent laws of the United States, under which this entire shoe machinery work from the very beginning has been carried on, is perfectly clear and definite. The industry has grown up under, and has been based upon and made possible by, the rights established by those patent laws."

The propositions thus quoted from the respondents are substantially supported by the record. It also may well be gathered from *United States* v. *Winslow*, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481, that the United States, which were then free to put their case as they saw fit, thus put it with reference to the date of the organization of the Shoe Machinery Company, and thus gave it color which we are free to accept as abiding with the organization so long as effectual proof of change to the contrary was not furnished, as it was not. Under the circumstances of the case, this special observation is justifiable, notwithstanding *United States* v. *Winslow* was a criminal proceeding, because, no doubt, the natural presumption is that the United States made their case as they had reason to believe it to be. Indeed, it affirmatively and emphatically appears at various places in the bill, and it runs all through it, that all the essential interests which entered in 1899 into the combination forming the United Shoe Machinery Company were, at the time of the formation of that corporation, covered and protected by patents, and there has been no evidence that at any time in the history of the corporation there was any change from its original purposes.

It was at one time largely understood that the Supreme Court substantially held that all combinations of patents were outside the Sherman Anti-Trust Act. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 90, 91, 22 Sup. Ct. 747, 755 (46 L. Ed. 1058), decided on May 19, 1902, was thought to declare this view. In this case, at page 90 and sequence, some peculiar limited exceptions are referred to, as for example, a statute requiring an inspection of burning oils

Opinion of the Court.

and providing a penalty for its violation. The opinion then proceeds, at page 91:

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that [355] any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

This impression was apparently strengthened by expressions in *United States* v. *Winslow*, 227 U. S. 202, 217, 33 Sup. Ct. 253, 57 L. Ed. 481. It is true this case also gave effect to the fact that, on the face of the combination of patents then under review, there was an effort for greater efficiency; but the opinion continues that the machines involved were patented, and it assumes that making them was a monopoly in any case, and that the exclusion of competitors from the use of them was the very essence of the right conferred by the patents. Then the opinion refers back to the *Paper Bag Patent case*, 210 U. S. 405, 429, 28 Sup. Ct. 748, 756, 52 L. Ed. 1122. There it appeared that the patent in suit had been locked up by the complainant, its owner, and that the complainant had neither used it nor allowed any one else to use it. There was neither lack of means, nor any other excuse for locking up the invention, except the desire to protect other machines which the complainant was manufacturing. After some incidental explanations, the court there said:

"As to the suggestions that competitors were excluded from the use of the new patent, we answer that such exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive."

What was said there was directly in issue.

But other late decisions of the Supreme Court seem to demonstrate that the cases we have cited do not state the whole law, but only lead up to the general rule, without showing how this general rule yields to exceptional circumstances. Moreover, this position does not give full effect to the second section of the Sherman Anti-Trust statute, which

covers "every person who shall monopolize or attempt to monopolize," as well as those who combine or conspire with any other person, or persons, to monopolize. Certainly in *United States* v. *Reading Co.*, 226 U. S. 325, at page 358, 33 Sup. Ct. 90, 57 L. Ed. 243, reliance was placed on *Swift & Co.* v. *United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518, where a plan said to consist of many parts or elements was held to constitute a monopoly forbidden by the act. There the court observed that whatever we may think of the elements separately, when taken up as distinct charges, they are alleged effectively as elements of a scheme. It is true that in the Reading Company case there was an underlying combination among the principal promoters of what resulted; but we find there this recognition of what may happen where there is no such combination, given in the language we have cited from *Swift & Co.* v. *United States.*

The case, however, that controls the present proceeding in this important aspect is *Standard Sanitary Co.* v. *United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, decided on November 18, 1912. There the opinion was drawn by the same learned justice who drew the opinion in the Paper Bag Patent case, so that we may assume that the two cases go along hand in hand. The opinion in the Standard Sani-[356] tary Company case refers twice to the opinion in the Bement case, once at page 40 and again at page 48 of 226 U. S., at pages 11 and 14 of 33 Sup. Ct. (57 L. Ed. 107). At page 48 it is said as follows:

"There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman Law, but the fact was not established and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 [32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880], which contravenes the views herein expressed."

Thus the Standard Sanitary Company case, and consequently the present proceeding, were and are by express language distinguished from the Bement case, and the dis-

tinction thus made is that relied upon by the United States here, namely: Instead of dealing with one or more contracts between one or more parties, incidentally made and having no relation to each other, we are dealing with a vast scheme which unavoidably affects the public interests. We need not elaborate other late decisions which indicate and enforce the proposition that a monopoly may be established in violation of the second section of the Sherman Anti-Trust Act, conforming to the explanation of the Bement case which we have given, and without a formal combination; as, for example, *United States* v. *Patten*, 226 U. S. 525, 541, and sequence, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 85, 86, 33 Sup. Ct. 53, 57 L. Ed. 124; and *Strauss* v. *Publishers' Association*, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, at various points in that opinion. Therefore, in view of what we have said, it is necessary for us to go a step further and point out that we have here an organization, supported merely by a diversity of patents or machines patented in whole or in part, and inquire whether the alleged resulting monopoly is arrived at by injurious provisions contained in the licenses and leases referred to, which go beyond what the respondents might justly require.

We should now state generally that the United States claim that, while there are no contracts in form as between the different customers of the United Shoe Machinery Company, the matters are so tied together by the provisions of these licenses and leases, and the scheme created thereby is so complete, as to have the same practical effect of producing the alleged monopoly which the statute prohibits, as though there had been agreements in a multiple form executed by the United Shoe Machinery Company and its various customers. They also claim that this results in a scheme such as we have already referred to. The allegations in this particular are for a large part of a very general character, and it may well be doubted whether the larger portion of them are not so general as to fail to require our attention according to the proper rules of pleading. Perhaps, however, on

that score the variety and number of the leases, and of the various provisions thereof, are so great, and the parties with whom the United Shoe Company have been dealing were and are so numerous that it would be unreasonable [357] to require the complainant to set out the facts in detail. We have, however, given the language of this part of the bill verbatim, and we can approach it with the general statements substantially in effect that there is nothing in the terms of the leases justifying any allegation indicating a purpose to enhance the cost of the machines to the users thereof, to wrong or oppress the public, or to impose any arbitrary, oppressive, or unreasonable terms.

The bill also alleges that these provisions are not found in the earlier leases and agreements existing prior to the organization of the United Shoe Company. Whether they were or not we regard as immaterial, except as excusing the respondents from any wrongful intention, because we agree with the United States in the proposition that whether or not the conduct of the respondents is in fact in restraint of trade does not depend on the effect of any element considered singly, so that every element considered singly may be wholly innocent; but the question of an existing monopoly, or an intended monopoly, is to be determined by the effect of all the elements which are in fact combined.

The bill gives us no particular rule by which we can determine whether the provisions of the leases and licenses referred to are abnormal, or unjust, or unreasonable, nor where, nor how far, they are within the allowances which the law makes for the protection of legitimate trade and manufacturer. We have nothing bearing directly on this topic except the apparent admission that the common provision contained in the leases and licenses, understood and called the "full capacity clause," standing alone, would be valid, and except, also, expressions like those found in *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, 609, 34 Sup. Ct. 951, 58 L. Ed. 1490, decided on June 22, 1914, summing up the previous decisions of the Supreme Court, that the Sherman Anti-Trust Act, "in its proper construction," "was not intended to reach normal and

usual contracts incident to lawful purposes and intended to further legitimate trade."

Nevertheless, we fail to find in the development of the United Shoe Machinery Company and its operations, any support for the alleged charges in the bill of intended oppression, arbitrary conduct, or anything of that nature, especially so far as any allegations cover any attempts to destroy or cripple competitors. Looking at the great mass of facts proven in the case and the immense number of transactions of the United Shoe Machinery Company, the evidence offered in that direction is so ineffectual that its weakness furnishes of itself satisfactory proof against what was intended to be established thereby. We find no evidence of what was shown especially in the *Tobacco Company cases*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, namely, a purpose to destroy what could not be acquired by straightforward methods. The fact that the United Shoe Company has acquired so large a percentage of the business of the country to which it devoted itself comes so largely from the use of extraordinarily competent methods as to shut out from the eyes of the impartial investigator suggestions of other methods. So we lay aside that part of the case, and deal only with the proven facts, and the legitimate results of those facts, [358] with little consideration, however, for any charges in this connection, or elsewhere, of intended oppression or unreasonable course of procedure, or of results which can be attributed to any unworthy motive. This, however, according to the well-known rules of law, does not necessarily relieve the respondents from what actually resulted from whatever they did, or from being responsible for these results so far as they might be expected to be foreseen.

The result of our consideration of what appears in the bill on this topic, and of the very general expressions found in it, and found in the authorities applicable hereto, have rendered necessary that we set out, as we will do with very considerableness, the claims of the respondents as to the nature and amount of the operations of the United Shoe Company, for the purpose of making clear the just amount of flexibility of the provisions of the leases and licenses as

complained of by the United States, which should be regarded as applicable to what is admitted, or must be admitted, to be legitimate for the business of the United Shoe Company.

We may well call attention to some particular provisions in the leases and licenses, although they do not carry us very far towards solving the whole case before us. Among other provisions is one requiring lessees to use exclusively one or more classes of machines included in groups of machines, under penalty of having all the machines included in those of other groups reclaimed. The licenses also cover periods of not less than 17 years, thus regardless of the unexpired terms of the patents relating thereto. Also they cover a requirement that the lessees obtain from the United Shoe Company all duplicate parts, extras, mechanisms, and devices used in operating, repairing, or renewing. With this there is an allegation that the parts can be obtained only at enormous prices. The record, as we repeat, gives us no definite rules for determining how far each of these provisions is legitimate, or otherwise. It nevertheless appears that the prices for duplicate parts, etc., were never exorbitant, but that the contrary is true. Also it appears that, to a large extent, the requirement that duplicate parts, etc., should be obtained from the Shoe Machinery Company is for a large part reasonable. This and some other provisions may relate to the standardizing, and to continuous harmonious use of a long line of successive machines, for which standardization and harmonizing lie at the foundation, as they are the very like of some modern systems of production. Other allegations with reference to this topic are either frivolous or too general to support of themselves any practical results. Consequently it becomes necessary for us to state the case more fully as claimed by the respondents, in order to attempt to furnish some tests as to how far provisions of the kind complained of are legitimate with reference to some portions of the business of the Shoe Machinery Company which every one must admit it is entitled to pursue. The positions and peculiarities of the case are so extensive and novel that it is impossible to apply with

any satisfaction any ordinary tests of what are reasonable and normal, and what are unreasonable or abnormal, requirements of the leases or licenses, without a particular view thereof. The case in these respects, as stated by the [359] respondents, has so many phases that the determination of what portions of the provisions of the leases and licenses are normal, legitimate, or reasonable as applied thereto is a complex topic, requiring much investigation, supported with great patience and care. What we now extract from the positions of the respondents in reference thereto is substantially supported by the record.

These extracts commence with the fact that the circumstances appearing in the well-known *Standard Oil case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and the *American Tobacco Company case*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, are so far unlike the circumstances appearing here that no particular assistance can be derived therefrom with reference to what conditions or requirements should be normal, legitimate, or reasonable here. The respondents say:

"This particular business of shoe machinery started about 1860 with the McKay sewing machine. There are men now alive who saw the first McKay machine, introduced about 1860. At the time the machine was invented by Lyman Blake, there was not in a shoe factory a single machine outside of the sewing machine for stitching the uppers, except a machine for making strips of outsoles and a knife organized into a frame which roughly shaped the outsole. There were a few crude pegging machines in use. There was not another machine, and shoes were made absolutely by hand. The business was insignificant as a whole even, and the individual units were most insignificant. McKay had $140,000 when he bought it. He thought that it was a perfect machine, but his $140,000 was gone before he was able to sew a shoe on it commercially. And that is the history of all these machines. They have been most expensive in their development. One unexpected failure after another has broken the hearts of the inventors and promoters before success was attained."

"Then came the Civil War, and the demand for shoes for the soldiers was such that the McKay machine was able to get a start which otherwise it might not have gotten."

"At the moment when McKay started to put this machine out, Elias Merwin and McKay together invented for this business the royalty system, and that system has prevailed throughout the shoe-

Opinion of the Court.

machinery business from the beginning. It was a system of leasing machines, adopted in order that the shoe manufacturers might be induced readily to take the machines. Because in the case of each new machine it was all an experiment, the shoe manufacturers did not dare to take such machines and invest their capital in them. They did not have the capital to invest. This policy was satisfactory to the last degree, and from McKay's time to the present day the royalty and lease system has been the prevailing and characteristic method of the shoe-machinery business, so far as the great variety of elaborate and refined machines which have followed the first McKay machine are concerned. One thing which the Government asks in the case is that the leasing system which has prevailed from the start in this industry should be destroyed. If the court should declare illegal, as the United States asks it to do, the protective clauses in our leases which we have put there to make the system safe and practicable, the leasing system would have to go."

"There are two important aspects, at least, in which this shoe-machinery business is unique. One is that, in every single step in this business up to the point where to-day we are building 350 machines, the machines have been patented machines, always patented, and likely to be patented for an indefinite time in the future, because this art is not yet exhausted. Thirty-five millions of dollars of the property of the Shoe Machinery Company is in the hands of these shoe manufacturers. It finances them to that extent. It keeps those machines in repair, so that the shoe manufacturers have no question of maintenance—no cost of maintenance to deal with. It sees that information calculated to make the operation of the machinery more effective is collected **[360]** and disseminated throughout the factories. The shoe manufacturers who deal with our company do not have to be on the watch to get the best possible machines. They know that the defendant will supply them with the best. They know that their machinery is the best in the world, and that, if better is devised, they will surely have it. There is nothing for them to look after except the question of labor, the purchase of material, the design of their goods, and selling them. It is with this business, not with any other, that the court has to determine whether what these respondents have done, what contracts they have made, have been in the normal, orderly, natural line of development."

"McKay had his lasting machine, Thompson had his lasting machine, soon Copeland came along with his lasting machine—all patented; and the impression right straight through of those working in this art who were most intelligible was this: That you might do many things with machinery in shoe manufacturing, but you never could last by machinery, because you are dealing with leather, which is a most difficult thing to deal with. It is so expensive that every scrap should be saved, and none injured. No two adjacent centimeters of leather are the same in character and condition. In flexibility and

Opinion of the Court.

capacity for stretching no two spots are alike, the surface character constantly varies, and yet you must make a finished shoe without waste or loss and as perfect as possible, and the two shoes of every pair must be perfectly matched. It was the general belief that the lasting machine was an idle dream."

"But the lasting machine has come; and so has every other machine that was required in this industry. The 150 processes that are employed in making shoes are all done to-day by machinery. It is only a short time ago that there was some talk about cutting out the uppers; men said that you never could do that. Human intelligence seemed absolutely essential for the work. Now, we have a machine that doubles the efficiency of the human operator in cutting or dieing out the uppers, and does it much better. This is the clicking machine."

"Moreover, the No. 5 laster of to-day is of such a character that the Ideal and the Chase of 1899 are practically obsolete machines. The welter and stitcher of to-day are enormously more useful, efficient, and economical than those of 1899, as the record shows. The rough rounder has been perfected; and so it goes right straight through with every machine in use in 1899, as to all of which there have been a long line of patented improvements, one succeeding another at frequent intervals, every one of which does something that previously was done by hand, or was not done at all. So that to-day you have a completely developed organization of machinery adapted to the manufacture, under the most favorable conditions, of the shoes that the public require. If the requirements change, the machinery is at once changed to meet those new requirements, and there has been a continuous and large gain in economy and efficiency.

"We talk chiefly about the welt shoe, because that is the most important shoe of all, and the one to which our business most largely relates. There were only 17,000,000 of them made in 1898, or less than 10 per cent of all shoes made. In 1910 there were made over 86,000,000 pairs, and the proportion of welt shoes to all shoes made has been steadily increasing. And why this increase? Because we have given to the shoe manufacturers, between 1899 and the present time, better machines and radically new machines, which enabled them to make those shoes successfully and at a low cost. We are solely responsible for this entire development. The whole credit of it belongs to us."

"Now, it is not unreasonable to look at this complex and complete shoe-machinery system in this way. Take a screw machine. There there is an organization on one frame which feeds the bar, cuts off the right length, puts in the screw thread, makes the point, makes the head, and cuts the slot in the head, thus making a complete screw. The manufacture of a shoe in a modern factory is practically a unitary operation, like the making of a screw; every one of

the many steps being coördinated to the others, as if all were taken in a single machine. Everything is aimed at one product, and every single machine is definitely related to the machines that follow it, and to the **[361]** machines that are back of it. These machines, that we have talked about as being classified into 'departments,' cover sometimes machines of one department 'tied' to those of another; yet there is no consecutive relation of one department to another in the order of use of the machines in making a shoe, but you start in with one machine from department 'A,' and take the next from department 'D,' and then one from 'C,' and then one from 'E,'—the result being that, when you get through, they have all been interwoven, and the sequence worked out, not department by department, but one machine after another, in any order as far as the departments are concerned. That is, the whole is a continuous process, aimed at one unitary result; and each of the machines, whatever the distribution among the different departments, is organized to succeed the prior machine efficiently, and to prepare the shoe for the next machine. Any one of the machines may spoil a shoe, and the result is that one of the great problems of this art has been to organize each machine, so that not only will it do its work without injury to the shoe, but that there will be no difficulty when you come to the subsequent machines. The work of each machine must be done so that the next machine will work with the required accuracy."

That the whole system thus described, past and present, is, and has been, supported and covered by patented machinery, is shown by the extracts we have already made in that connection.

What we have submitted about the leasing system, and the propositions of the respondents which we have cited, and which cover so large a field, constitute an organization so successful in its operations, continuing so long a time, and so harmonious in its major parts, that anything which would bar out provisions in the leases and licenses necessary to the maintenance thereof must be admitted to be injurious to the manufacturers of shoes, as well as to the manufacturers of machinery, with regard to what each justly desires to accomplish. However, the numerous provisions prevailing in a very considerable variety of leases and licenses, in a very considerable variety of forms, involve so much investigation and so much study that that investigation and that study should not be claimed or expected from any court of justice as primary work; and it should first be taken in hand by a master. This proposition, moreover, is enor-

mously enforced by the systems of standardization, and of other special peculiarities, involved in the enormous work of repairs, and incidentally of supplying parts, which the Shoe Machinery Company is now accomplishing at important but distant parts of the United States, at an annual expense said to be in the employment of over 600 men, giving their services exclusively thereto, and all to the unqualified satisfaction and the very great saving of time and expense of the shoe manufacturers' industry. The better practice is to refer all such matters to special masters.

In this connection we make no special reference, and have come to no conclusions, in regard to the effect on the pending case of the legislation of Congress enacted since this case was submitted to us, nor with reference to the question whether or not the rights of the parties affected by this legislation would require supplemental pleadings. All such matters would primarily be a part of the special master's finding, if appointed.

We are brought next to a series of independent transactions on which the United States rely, relating to the acquisition of and control by the United Shoe Machinery Company of certain businesses, [362] alleged to have been acquired for the purposes of destroying competition, and thus extending the monopoly alleged in the bill, and covering various periods from March, 1899, to the time of trial, amounting, by the schedule given us, to something more than 50 instances. Some of these on their faces are only "efforts after greater efficiency," as suggested in *United States* v. *Winslow*, 227 U. S. 202, 217, 33 Sup. Ct. 253, 57 L. Ed. 481, already referred to. Those that remain which are of any consequence are connected with the acquisition of patents, either directly or indirectly, and are covered by what we have already explained. Of this latter class, so far as we can understand it, is the acquisition of the capital stock of the Goddu Sons Metal Fastening Company. This case is worthy of being treated as a typical one. The transaction occurred in March, 1899, the month after the United Shoe Machinery Company was formed, and more than 11 years before this bill was filed. It related to patentable

inventions for metallic fastenings. This transaction seems to be disposed of by the general propositions we have already laid down about patent rights. It also involves a complaint several times made that the United Shoe Machinery Company has taken agreements from inventors barring them from competing with it; but such agreements are legitimate in connection with sales so far as they run parallel to the sales, or wherever they avoid unnecessary competition. The law on this point, within this generation, has been extensively altered and broadened, so that now covenants of this kind may be taken coextensively with the breadth of the trade bargained for in connection with them. So far as we have been able to discover, the various agreements of the character spoken of and included in the prosecution have been no broader than the law now allows. There may be some minor exceptions, but they have not been brought specifically to our notice.

We come now to the transactions with Thomas G. Plant as alleged in the bill. The real life of this transaction is in what we have said about the patent rights involved here and about the provisions of the leases and licenses. Without those it would be impossible to construct any case of restraint of trade under the Sherman Anti-Trust Act mapped out by the bill we have before us. Without them there can be no illegal structure whatever. All the property, including that acquired from Plant personally, covered by these matters, has been broken up and lost sight of as an entity, except only the shoe manufacturing business, the control of which was acquired by the control of Plant's shares of stock in the T. G. Plant Company, while the shoe manufacturing business is not within the purview of this prosecution, because there is no claim of a monopoly acquired in that occupation. Whatever else was acquired from Plant was either patented machinery, or patents, or inventions which stood for incipient patents. So much, therefore, of the property acquired from Plant, except the shoe manufacturing business property, is subject to what we have already said about patents and the provisions contained in the leases and licenses we have referred to, incidental thereto. More-

over, as to all of these incidental matters, the learned counsel for the complainants said as follows:

[363] "The leasing system in and of itself is not a violation of law; the acquisition of competitors was not a violation of law; the threats and intimidation of competitors did not constitute, in and of themselves, a violation of law; but when all of these things are taken together they form an unlawful plan; therefore the plan will make the parts unlawful; so that if we started in 1899 with a lawful combination, and that combination is used to build up a monopoly, we see no reason why the court cannot go back to the original combination and separate it for the purpose of restoring competitive conditions, because that combination has been used as an instrument for monopolizing the business."

This can justly be construed as a proper admission that the subject-matters submitted by the bill are to be taken substantially as a whole; so that, if the fundamental matters, which lay at the foundation on which the structure was intended to be built, go out, the whole goes out. The court is not called on to reconstruct what was intended to be built by the United States, if the most essential parts of that structure have disappeared. It is well to observe that, to a stranger, the transaction with Thomas G. Plant seems a very large one; but, as compared with the manufactured product of some of the witnesses who testified in the case, it was a minor thing, and particularly so when compared with the product of 86,000,000 pairs of welt shoes in 1910, and as compared with the great transactions to which this prosecution relates.

There have been many unthinking criticisms of the respondents in this case, both Federal and State, some semi-official, and some personal, and therefore irresponsible; but the conduct of this long and laborious trial before this court has been a model for those who witnessed it. It has been conducted with extraordinary persistency and ability, but with fair and open hand, and constantly with that courtesy due the counsel and this tribunal.

The court having carefully considered the pleadings of the parties and their evidence, and heard the counsel, it is ordered, adjudged, and decreed that the bill of the United States herein be dismissed.

DODGE, Circuit Judge.

1. United Shoe Machinery Company of New Jersey, organized early in 1899 by consolidation of the properties and business of several constituent companies, is charged to have been formed in violation of the Anti-Trust Act.

This claim is based on two alleged grounds: (1) That it destroyed competition between the component companies; (2) that it was brought about with an unlawful intent on the organizers' part to destroy such competition and to use the consolidation as a step in carrying out an unlawful project formed by them to acquire a monopoly. (Petition, pages 18, 80, of record.)

Has the United States proved that such destruction of competition resulted from the consolidation as made it a combination in restraint of trade? Taking the facts to which the evidence relates in order of time, this is the first question presented.

The restraint or monopoly alleged in the petition is restraint or monopoly of interstate commerce in "any and all kinds of shoe machinery"; i. e., in shoe machinery generally.

But it appeared early in the trial that no such charge could be [364] proved, because neither the business of the component companies in 1899 nor that of the United Shoe Company from its beginning until the bill was filed related to "all kinds of shoe machinery." Both were always limited to certain kinds only. This was finally conceded, and the field of trade in shoe machinery with which this case is concerned limited by concession of the complainant's counsel to machines of the following kinds: (1) Lasting or "pulling over" machines, used for adjusting and attaching the upper of a shoe in process to a last; (2) machines for preparing bottoms and heels and fastening them to uppers; (3) machines for finishing bottoms and heels after they have been so fastened; (4) eyeletting machines for inserting eyelets in uppers; (5) "clicking machines" for cutting out uppers. The "shoe machinery" as to which restraint or monopoly is charged, therefore, includes machines of the above kinds only, for the purposes of all questions hereinafter considered. It is to be noted that such machines

are insufficient for the making of a complete shoe, and that no attempt to control machines for stitching uppers is charged.

We are concerned only with the first three of the above classes, so far as regards the above consolidation in 1899. None of the constituent companies then made or dealt in eyeletting or clicking machines. These originated with the United Company. It introduced and developed them later on, at different times during the development of its own business after 1899. Its eyeletting machines were first produced about 1902; its clicking machines in 1908 or 1909.

The United Company was formed February 7, 1899, taking over, in exchange for its own stock, or for cash, or both, the business and property of each of the following concerns: Goodyear Shoe Machinery Company and International Goodyear Shoe Machinery Company (both in the same line of business and hereinafter together called Goodyear Company); Consolidated & McKay Lasting Machine Company (hereinafter called Consolidated Company); McKay Shoe Machinery Company (owning and controlling Davey Pegging Company and hereinafter called McKay Company). From money obtained by issue and sale of other shares of its own stock it bought in March, 1899, the stock, business, and property of the Eppler and International Eppler Welt Machine Companies. These, though strictly acquisitions of the newly formed United Company, after its formation, may, for the purposes of the present question, be regarded as constituent companies.

To allegations found in the petition (page 18) that the business and property of the Goodyear Company, the Consolidated Company, and the McKay Company were taken over by the United Company "at values far in excess of real worth," reference is made at this point only in order to state that no proof of any kind was offered in support of them, it was not argued on the petitioners' behalf that they were true, and they therefore require no further notice for any purpose in the case. There can be no doubt that each concern had an established business already of great value and possessing great possibilities of development, or that each

also owned patents and property of very great value in connection with its business.

Up to the time of their union each constituent concern had been [365] dealing, generally speaking, in a line of shoe machinery for the most part distinct from that dealt in by the others. Thus the Goodyear concern's business had been that of making and dealing in welt-sewing and outsole-stitching machines and auxiliary machines for use therewith, all designed for the manufacture of Goodyear welt shoes; also one kind of lasting machine, called the "Ideal," designed for lasting women's welt shoes. The machines of the Consolidated concern were lasting machines of three kinds, designed respectively for lasting men's welt shoes (this was called the "Chase"), heavy metallic fastened or pegged shoes, and McKay sewed shoes. The machines of the McKay concern were heeling machines, metallic fastening machines, and Davey pegging machines. The Eppler machines were welt-sewing machines and certain auxiliaries therewith used in making welt shoes (not Goodyear welts). After the union the United Company proceeded to make and deal in all the above machines.

It is here to be noted that the Goodyear welt method is only one of several methods of uniting the upper and sole of a sewed shoe. This method was from the outset in direct competition with the McKay method, and it has so continued until the present time. The Eppler welt machine was for doing the same thing by still another method. As the McKay method is and has been open to all the world, shoe manufacturers are and have been always able to obtain machines for sewing uppers and machines (i. e., McKay sewing machines) for attaching bottoms to uppers, independently of the United Company or any of its constituent companies.

The various machines produced as above by each constituent concern were, as the petition alleges (page 15), all made "under letters patent of the United States and of other countries." The patents belonged to the respective concerns and covered improvements from time to time embodied in each machine during the course of its development by the concern producing it. Each concern had so far developed and im-

Dodge, C. J., concurring.

proved its own machines that they were, in 1899, the machines principally in use by shoe manufacturers throughout the United States in doing the respective kinds of work for which each was adapted as above. All the patents referred to passed by the consolidation to the United Company. Each concern had further improvements upon its machines under trial, and all the rights in these inventions also passed to the company.

The combination was not unlawful so far as it did no more than put the different groups of non-competing patented machines into one control. *United States* v. *Winslow*, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481. It was not unlawful unless, to an extent injurious to the public interest, it destroyed competition. In support of the charge that there was such destruction of competition, the United States contends that before the combination (1) the Goodyear Company and the Consolidated Company were competing in lasting machines, and (2) the Goodyear Company and the Eppler Company were competing in welt-sewing machines. Unless the termination of such competition as existed between these concerns in respect of these machines made the combination unlawful, it was not unlawful because of any destruction of competition involved in it.

[366] (1) As to the alleged competition in lasting machines, it is not claimed that there was any, so far as two of the three kinds made by the Consolidated Company are concerned. These are the "McKay-Copeland" laster for lasting heavy metallic fastened or pegged shoes or brogans, and the "hand-method McKay" laster for McKay sewed shoes, and neither of them could be used to last welt shoes, for which purpose alone the Goodyear Company's "Ideal" laster was adapted. The only question here is whether the latter machine can be regarded as competing with the remaining laster of the Consolidated Company (the "Chase"). With still another laster with which the Consolidated Company was experimenting in 1899, for use on welt shoes, we are not here concerned, because, though this laster was afterward further improved, developed, and finally furnished to users by the United Company, it had not been made an

article of commerce in any practical sense when that company was formed.

There is no proof of any actual use of the "Chase" laster otherwise than for its intended purpose of lasting men's welt shoes. It could not work well for use with the lighter leather whereof women's shoes are made. The "Ideal" laster, used almost exclusively for its intended purpose of lasting women's welt shoes, could not be relied on to work well with the heavier leather whereof men's shoes are made. The proof relied on to show that it competed with the "Chase" went no further than to show that a number of "Ideal" machines, small in proportion to the total number then in use, were being used in a few factories on men's shoes, notwithstanding their want of adaptation to such use. That there was any attempt to put either machine into the market as against the other does not appear. No competition between the two in the usual sense of the term is shown. After the consolidation, by the addition of a patented "hold-down attachment" added by the United Company to the "Ideal" in 1901 or 1902, some of the defects referred to were removed, but not until then can it be said to have been commercially successful for work on men's shoes. Before this improvement, it possessed at most a limited possibility of such use. I am unable to consider it established that competition in any practical sense was destroyed when the United Company became owner of both machines.

(2) As to the alleged competition in welt-sewing machines, the question is to what extent the Eppler welting machinery can be regarded as competing with the Goodyear welting machinery. Outside of that produced by these two concerns, no other welting machinery appears to have been on the market at the time.

The Eppler machines were adapted to produce men's thick-soled welt shoes only. They could not produce women's welt shoes (except perhaps those having the thickest soles), nor turn shoes of any kind, nor Goodyear welt shoes, either men's or women's, because of the difference between the respective machines in the character and position of the seam left in the inner sole of the shoe. The Good-

year machines could produce shoes of all the above kinds. The differences referred to resulted from differences in the character and operation of the machinery belonging to the different systems. These differences in character and in possible field of use had resulted, when the [367] United Company was formed in 1899, in the fact that over 2,500 Goodyear welting machines were in use as against 30 or 40 Eppler machines, one-third of these being used in the factory of the president of the Eppler Company. The evidence leaves me unable to believe that the possible field of competition between the two machines was large enough, or any actual existing competition significant enough in amount, to warrant the conclusion that the acquisition by the United Company of both machines involved such destruction of competition as rendered it unlawful. The Eppler machines were not suppressed by the United Company. It continued to supply them until the progress of improvement in such machinery superseded them. The patents covering them have long since expired, and it is open to anyone to make and use such machines if he desires. There is no present monopoly in them, and no action taken by the court could restore them to the field of competition, or encourage or create competition by them.

Nor, if such competition as is shown to have existed between the "Chase" and the "Ideal" laster be taken together with that shown to have existed between the Eppler welting machinery and the Goodyear welting machinery, do I find it credible that the avoidance of both amounted to a consideration of any substantial importance, so far as the formation of the United Company was concerned. No reason appears for supposing that the real purpose for which the constituent companies were brought together, as disclosed not only by the evidence regarding all the circumstances as they existed in 1899, but by the evidence as to the course of development thereafter pursued by the United Company, was other than that stated in a circular letter to the Goodyear stockholders issued February 8, 1899, the day following the organization of the United Company. (Petitioner's Exhibit 152.) This dwelt upon the advantages to

Dodge, C. J., concurring.

be secured by putting into one control "the most efficient types" of shoe machinery. In *United States* v. *Winslow*, above cited, which was decided more than a year after the present bill was filed, it was said that the combination here in question was, on its face, "simply an effort after greater efficiency," and the legality of combination for such a purpose is fully recognized.

Under their respective patents upon the "Chase" and the "Ideal" lasters there was litigation pending in 1899 between the Consolidated Company and the Goodyear Company, each claiming that the other's machine infringed its patents. Also under the patents covering their welt-sewing machines there was similar litigation pending between the Eppler Company and the Goodyear Company. A result sought to be attained by both parties to these controversies, and accomplished by them through the acquisition of all the patents by the United Company, was the termination of all this litigation. Reference is made below to other later acquisitions by the United Company, an important feature of which was that litigation, troublesome and expensive on both sides, was avoided or terminated. In so far as any of the defendants' transactions were in order to accomplish results of this kind, it cannot be said that their purpose was unlawful.

For the reasons stated, I am unable to find the charge that the United Company was unlawfully formed because of competition which it de[**368**]stroyed sufficiently supported by the evidence. It would, in any case, be difficult to regard this as sufficient ground for a decree dissolving the company into its component parts, under a bill not filed until more than 12 years had passed since the combination complained of was accomplished. During this period, as the evidence shows, investments of a very large amount had been made, not merely by the defendants, but also by the outside public, in the extension and development of the company's united business, the component companies passed out of existence, and the machines as made by them in 1899 were so far developed, improved upon, or added to by the United Company as now all to have become obsolete. To put the parties or the public back into the state of the prior art which existed in 1899 is, of course, an impossibility.

Dodge, C. J., concurring.

2. Coming next to the question whether or not it has been proved that the United Company was formed with an unlawful intent on the part of its organizers to destroy competition in the future and use the consolidation they then effected as a step in carrying out an unlawful project to establish a monopoly, we are brought to the consideration of the acts and doings of the United Company, or of the other defendants through its means, from the time it was formed until the filing of this petition in December, 1911. It appears that the United Company itself, and what has been done in connection with it during that period, has been under the control, speaking generally, of the same defendants who brought about its formation in 1899. Of their actual intent in forming it, and in taking the various steps which they have taken as above in connection with it, there is no direct proof overcoming their denial that it was such as the petition charges, and no way of judging, except from the necessary results of all the steps proved to have been taken by them, as a whole.

But it is important at this point first to determine how far certain allegations of the petition, which characterize the defendants' alleged project and their motives for forming it, have been sustained by the evidence. These are found on pages 15 to 17 of the record, and they are in substance that the component companies were, in 1899, manufacturing their respective machines and parts thereof under patents, that "many of the basic patents on the principal machines were about to expire," that their manufacture and use was thus about to become open to the public "in the near future," and that the defendants, not being satisfied with the rights they had enjoyed under the patents and intending to expand and perpetuate them to the public detriment, devised the alleged project of acquiring a monopoly which the petition thereafter describes.

This trial began on May 20, 1913. On June 27, 1913, the petitioner, having introduced substantially all its other direct evidence, stated that it desired to offer proof in support of the allegations just referred to, but was not then prepared to go into the matter.

By consent, an order of reference to a special examiner was thereupon entered (pages 262 T, 1996) for the purpose of taking such evidence as either party should offer regarding those allegations, out of court. Such evidence was required to be completed by October 11, 1913, but successive extensions of the time were afterward found nec[369]essary and allowed by consent. Before the examiner, the petitioner did not complete its direct evidence until October 6, 1913, and the evidence on both sides was not completed until November 19, 1913.

At the final arguments, however, on June 2, 1914, the statement was made by petitioner's counsel that so many machines and patents were involved that examination of more than a very few had been impossible. It seems obvious, therefore, that the allegations in question could not have been founded, when they were made, upon any adequate or complete investigation of the facts.

Nor can it be said that they have been sustained by the evidence before the examiner. It seems unnecessary to spend time in considering what patents could and what could not properly be regarded as "basic," in view of the fact that, of the patents principally relied on as such by the petitioner—those protecting the welter and stitcher of the Goodyear Company—there were two, one upon its welter, the other upon its stitcher, which ran until 1908 and 1909, respectively. The petitioner's final position, indeed, as to what was proved by the evidence before the examiner, was by no means that taken in the allegations referred to, but was only that the two machines above mentioned and others protected in 1899 by patents not insisted on as "basic" patents, became free to anyone to make or use—without any of the patented improvements added to them by the United Company since 1899, but nevertheless capable of successful commercial use—before the filing of this petition in 1911. In view of all the above, I must regard the allegations here in question as not sufficiently supported by proof, and hold that no such motive is shown to have prompted either the organization of the United Company or any of its subsequent doings. The effect of the evidence and of the

petitioner's argument is to show that Goodyear machines of the old type are capable of commercial use and could have been made by anyone who chose to make them. That, after the expiration of the two so-called basic patents, machines constructed according to them were not used, is sufficiently accounted for by the superiority of the newer machines which the defendants had introduced. For that reason the older machines did not enter into competition with them, and the defendants cannot be charged with suppressing such competition.

3. The combined business of the component companies, as conducted and developed since 1899 by the United Company, related most largely to the machines used in producing welt shoes. The use of such machines (and thereby the production of and demand for such shoes) is shown to have been very greatly promoted by patented improvements made upon the machines of 1899 by that company, greatly increasing their efficiency and capacity, and by improvements effected by that company since 1899 in the methods of manufacturing them. It appears that the total number of welt shoes produced in this country in 1899 was about 17 million pairs, and in 1910 about 86 million, the total production of all kinds of shoes increasing during the same period from about 175 to about 280 million, and the Goodyear welt shoe being all this time in direct competition with the McKay sewed shoe.

It is further shown that the above improvements in the machines [370] and their manufacture were accomplished by means of constant investigation, experiment, testing, and invention by competent experts employed by this company, involving a very large expenditure on its part. These efforts were directed, not only toward making each machine as efficient as possible by itself, but also toward increasing its efficiency for so performing its own operation upon a shoe as best to combine it with the work upon the same shoe by the numerous other machines required for performing the remaining necessary operations—in order that all the many successive operations performed should coöperate toward the most economical and efficient accomplishment of the best

final result in product. And besides thus developing and improving the machines of 1899, the company kept pace with the requirements of manufacturers by the invention and production of many other machines or improvements, unknown in 1899, as the need for them became apparent.

There is no question that the above-described development of the United Company's business has resulted in a very great commercial success. Its machines, as was the case with those produced by the component companies in 1899, have ever since been those which shoe manufacturers in general can use to the best advantage and therefore prefer. The increase in the number of its machines in the hands of users has been very large. Nor is there any question that of all the machines, of the kinds to which this case relates, in use when the petition was filed, those of the United Company constituted all but a very small proportion.

It is nevertheless true that, considering the whole field of machinery for stitching together the bottoms and uppers of shoes, there has all the time been free competition. The use of other machinery to accomplish the purpose has always been open to shoe manufacturers. In that part of the field of trade in shoe machinery to which the case is now limited as above, the defendants have been not monopolists but competitors. Their only means for holding the field have been legitimate means—better machines. Their specialization in machines for bottoming shoes, and not a monopoly of such machines, has been the cause of their success.

No support is found in the evidence for the charge in the petition (paragraph X) that "enormous and unreasonable profits" have been made. This allegation is made in connection with, and apparently depends upon, the allegation of which, as above stated, there is no proof—that the properties combined in 1899 were taken over at excessive valuations. Nothing shown by the evidence warrants the conclusion that profits unreasonably out of proportion to the extremely large cost at which the business has been developed and is maintained, the great investment of capital it has required, and the enterprise, inventive skill, and business ability devoted to it have been realized. Nor has it been made to appear that the charges made for the privilege of

using the machines are exorbitant or unreasonable, especially in view of the great benefit to manufacturers using them, in lessening their cost of production.

If there is any sense in which the result attained as above can be called a "monopoly," it does not follow, in view of the circumstances [371] shown, that the defendants have either restrained trade or been guilty of monopolizing or attempting to monopolize within the meaning of the act. Nor can I regard the case as one in which any presumption arises, from the fact that so large a proportion of the users of these machines use the defendants', that the defendants have committed any of the above forbidden acts in accomplishing the above result. The proof is too complete that it has been in fact reached by the use of methods entirely lawful, the leading features whereof are below indicated. As has been said, the field they have occupied is a special field, and the product for which their machinery is adapted is of higher price and quality than the product of the machinery of others.

The business which the defendants have developed and established is not and has never been one in which everybody might freely engage. No one else could lawfully make or use machines containing improvements covered by the defendants' patents. Nor can it be said that the demand for such machines which they have supplied existed independently of the defendants; on the contrary, they have created it by the new methods of shoe manufacture which their improvements have educated and enabled manufacturers to follow. It cannot justly be said that the case is one in which a field of commerce normally belonging to all has been captured by a single concern. The principles applying in such cases cannot justly be applied here. In so far as the defendants' occupation of the field has been due to the greater desirability of their patented machines and to the superiority of their methods of making and supplying users with such machines, no reason appears for holding it unlawful, whatever its extent.

Supplementing the production and development of its various patented machines, methods introduced by the United Company for keeping them in efficient operating

condition while in the hands of their various users throughout the country have most effectively aided the development of its business. It has undertaken, not only to train operatives in the proper use of the machines and to secure the prompt repair of any machine disabled in use, but also to supply each user from time to time with the latest improvements, either by adding them to the machines or by substituting improved for superseded machines, without extra cost to the user. This service it has furnished by maintaining at central points bodies of competent employés who attend to the above matters whenever and wherever they are notified by users that such attention is desired.

A system of standardization, introduced since 1899, whereby corresponding parts of the various machines have been so constructed as to be interchangeable whenever possible, has, in connection with the service furnished as above, effected a great reduction in the time lost by machines in waiting for repair. The introduction of such a system could not have been effected by the component companies, because each carried on the manufacture of its machines at a different place. While each of them rendered to its users some service of the character described, this was done to a limited extent only; and the maintenance of any such system of rendering it as the United Company has pursued would have been impossible to them, because of the heavy outlay involved.

[372] The service secured to users of the machines by the system just described has been furnished to users without charge in addition to the royalties paid by them under the leases of their machines. For duplicate parts, extras, etc., required in operation, repair, or renewal, the terms of the leases required payment. Allegations in the petition that exorbitant prices were charged for such duplicate parts, etc., were not sustained by the evidence, and have not been insisted on in argument.

That the degree of success attained, and the preponderance in number of users supplied which the United Company has secured, are fully accounted for by the superior efficiency it has developed in its patented machines for work in combination with each other, together with the superior facilities it affords as above for their most efficient use,

must be regarded as shown beyond question. It is not disputed that, when the petition was filed, its machines represented, in number and amount, the highest development ever reached in the art to which they belong, or that they are most in demand by manufacturers of the higher grades of shoes for that reason.

So little room for doubt does the evidence leave that the success and preponderance referred to are the natural and legitimate result of the intrinsic merit of the patented machinery and service furnished as to require clear and convincing proof of any assertion that they are due to causes other than these. It cannot be said that of themselves they justify any such presumption that unlawful means have been resorted to in attaining them, as has been held to exist when, in a business whereof no lawful monopoly is possible, because it is normally open to all, the success of one competitor has been attended by the disappearance of such competition as previously existed.

4. The petition charges the United Company with acquiring and absorbing the business of 60 different concerns or persons, described as "competitors," in pursuance of their alleged unlawful scheme, and as one method whereby what is called its "monopoly" has been built up. The nature and circumstances of these transactions are next to be considered.

As to one of these concerns (Boston Blacking Company), also made a defendant in the case, the charge was withdrawn early in the trial, and the petition dismissed by consent so far as it is concerned. (Record, p. 261 A.)

The petition has also been dismissed as against two other concerns, also made defendants (J. C. Rhodes & Co. and Thomas G. Plant Company), though the charge regarding the acquisition of their business is still urged against the remaining defendants. The transaction involving the concern last mentioned requires consideration by itself. The 58 remaining charges of unlawful acquisition may be more generally dealt with.

The 58 concerns or individuals referred to made transfers to or agreements with the United Company at one

time or another during the years 1899 to 1910, inclusive; and the transactions related more or less immediately to shoe machinery in general, if the term be taken in its most inclusive sense. So far there is no dispute.

[373] Eleven of the transactions were at various times in 1899; eight in 1900; six each in 1901 and 1902; three each in 1903, 1906, and 1908; nine in 1904; one each in 1905, 1906, and 1909; five in 1910. Though thus extended through a period of years, and though widely varying each from the others in character, both in respect to the nature of the transaction itself, and also regarding the circumstances attending it, the petition sets them forth as if all had been in pursuance of one and the same scheme, there described as a scheme to control shoe machinery in general, though now called a scheme only to control the particular classes of shoe machinery before mentioned.

The nature of some of these acquisitions may be regarded as enough of itself to prevent them from being called indications of a purpose to control any of the particular classes of machinery now important, however it might have been were the scheme now asserted the one originally alleged, for controlling all shoe machinery in general.

This seems clear in the cases where the business of concerns engaged in selling sand paper, or in making patent brushes, or in making peg wood, was taken over; and hardly less clear, without further evidence, in the cases where the business acquired was making wire and spare parts for use in an obsolete metallic fastening machine, or making treeing machines and parts thereof, or making needles, awls, and rawhide mallets, or making nails and tacks, or dealing in cement, blacking, and second-hand sewing machines, or making metallic heels and counters to go outside the shoe whereon they were used.

The business of four of the concerns acquired is described in the petition as that of making eyelets, enameled or not. Neither is alleged to have been making any eyeleting machine. The eyeleting machinery wherewith we are concerned, however, has been repeatedly described by the peti-

tioner as machinery for inserting eyelets in uppers; i. e., such as the machine first leased by the United Company in 1902.

To the cases wherein inventions or machines for pasting outer leather to linings, or for cementing fabric to uppers, were acquired, little significance can be given, in view of the petitioner's abandonment of the claim of any scheme to monopolize machinery for producing uppers.

In several others of the transactions specified there was no acquisition of any tangible property whatever. These consisted of contracts only—either contracts for employment by the United Company, or contracts in which undertakings by it were accepted in substitution for obligations previously assumed by one of the component companies. In none of these cases is it made to appear that the party contracted with was a "competitor" in any kind of shoe machinery, or that the business of any such "competitor" was "absorbed."

There remain a number of instances involving the acquisition of patent rights, patents, or machines relating to or capable of being included within some of those kinds of shoe machinery whereto the case is restricted as above. In the larger portion of these the device or machine acquired is shown to have been of a kind not then being produced by the United Company. There being nothing unlawful, as above stated, in the acquisition of different groups of non-competing [374] patented machines, it is clear that, by such enlargements of the United Company's field of operation, no "competitor" can be said to have been absorbed or driven out of business, and that no reason appears for holding the acquisitions thus made unlawful either in themselves or because made in furtherance of an unlawful purpose.

The instances then remaining in which the United Company was at the time producing or trying to develop for production a patented machine for doing work more or less similar to that for which the invention of the machine acquired was intended are the only ones capable of being regarded as of any possible significance for the purposes of the petitioner's case. In all such cases it appears that the acquisitions made were of patented improvements, whether or not embodied in an actual machine, enabling the United

Company to increase the efficiency of its own machines, or to complete the development of others with which it was then experimenting, or had not yet succeeded in rendering commercially successful.

No case, however, is found among the acquisitions of the character last described wherein it has fairly been made to appear that actual competition existed between the device or machine acquired and any machine then being produced or experimented with by the United Company, of such consequence as justifies either the conclusion that the acquisition was for the purpose of suppressing such competition, or the conclusion that a material restraint of trade was thereby accomplished. In most of the cases of this sort the machine or device acquired was claimed to infringe patents belonging to the United Company, or the patent acquired was one which some machine belonging to it was claimed to infringe, or the application acquired was in interference with applications of its own, and the object of the acquisition is shown to have been the avoidance or compromise of pending or threatened litigation. In such cases it is still less possible to say that any wrongful absorption of a "competitor's" business has been proved.

The acquisitions above regarded as the only ones of any possible significance in the case were made at various separated times during the period of 11 years or thereabouts above referred to. It cannot be said that the later ones were in contemplation when the earlier acquisitions were made, because there is nothing to show that the circumstances attending any of them were such as could have been anticipated as likely to occur at the time of the preceding acquisitions. The most that can be said is that as, in the progress of events, the needs of the United Company became manifest and these opportunities presented themselves, they were availed of.

Taken together, the acquisitions of this class are, in importance and amount, only of a consequence relatively small in proportion to the entire field then lawfully belonging to the United Company. It does not appear that they contributed anything essentially important to that degree of

commercial success obtained by the company as above. If they assisted in obtaining it, it was by assisting the development of the machines to whose ultimate efficiency it was due. It can hardly be said as to any of them that they afforded anything more than a basis whereon to build. Speaking of them generally, it may be said that the invention or machine obtained required further development in the [375] company's hands before it could be properly used. Thus in the case of the Goddu Company, the first instance of alleged unlawful acquisition specified (page 28), the metallic fastening machines acquired by purchase of a controlling interest in the company were none of them in the hands of users; their then state of development does appear to have been such as made them capable of commercial use, whatever the merit of the inventive ideas they sought to embody; nor is the evidence sufficient for a belief that without reconstruction, radical in character, anyone could have used them as competing machines. In not a few of the cases specified, the patent or machine, being wholly experimental when obtained, proved an ultimate failure so far as commercial success went, notwithstanding much time and money expended in the attempt to develop it.

It further appears that, during the same period of time, the cases wherein the business of a concern producing shoe machinery was offered to the United Company, and refused by it, were far more numerous than the cases of acquisition specified by the petitioner. As to several, at least, of these instances of refusal, the evidence warrants the belief that the business offered and refused much exceeded in importance to any such scheme of monopoly as now charged any of the specified acquisitions. The cases in which inventions were offered and refused during the same period were many times more numerous than the patents or inventions acquired. If a monopoly of all machinery for attaching bottoms to uppers was really undertaken, it is hard to believe that opportunities would have been neglected, as they were, such as those for acquiring the Union lock stitch machines, or the welters and stitchers of the R. H. Long Company, all of of them patented machines for use on welt shoes, or for acquiring a con-

siderable business in producing McKay sewing machines, though these were unpatented and not capable of use on shoes of that kind.

The petition charges generally that covenants in writing were taken from substantially all those whose business was acquired as specified: (1) Not to engage for long terms of years in competition with the defendants in commerce in shoe machinery; (2) to convey all inventions or patents in shoe machinery which they might make or acquire during such terms to the defendants.

These charges are not justified by the documents themselves, which have been produced. They are by no means uniform in their terms, there was no generally prescribed form for them, nor were they all the work of the same hands. Each was framed according to the circumstances of the particular transaction. In many cases, at least, the agreements required only that there should be no competition in the line of business involved in the particular transaction, or that all patents or inventions thereafter made in the particular line to which the acquired invention belonged should be transferred. There are enough of the agreements in these cases, which are without covenants of the kind described, to leave the allegation unjustified that such covenants were required in substantially all. And of the instances wherein covenants are found in any degree answering the alleged description, it may be said generally that none are clearly shown to have ex[376]ceeded what the law permits. Still less reasonable would it be to regard what is found in them as indicating a consistent purpose on the defendants' part to exclude all those with whom the agreements were made from all possible future competition with the United Company.

An allegation in the petition that the business of many competitors was bought at exorbitant prices fails of support in the evidence relating to any specified instance of acquisition among those thus far considered. As to them, indeed, no claim of the kind seems to be seriously urged.

5. The acquisition in September, 1910, from Thomas G. Plant, consisting principally of a large number of patents, or applications therefor, relating to shoe machinery—ma-

Dodge, C. J., concurring.

chines embodying those inventions and Plant's controlling interest in the stock of the Thomas G. Plant Company, a shoe manufacturing concern—is the most important in amount of the acquisitions specified, and the one most relied on by the petitioner.

According to the petition, Plant was a competitor of the defendants, and they acquired his business in pursuance of their unlawful purpose.

The evidence does not show Plant to have been a competitor in the ordinary sense. He was not carrying on any going business in shoe machinery. He was neither producing his machines nor supplying them to users upon any commercial scale, nor was he prepared so to supply them, though he had issued an illustrated catalogue of them. The petition alleges that he had been inventing and patenting his improvements for at least two years before 1910. In one factory only were machines embodying them being operated. This belonged to the Thomas G. Plant Company, whereof he owned a majority of the stock. He installed them there in May, 1910, displacing the United Company's machines previously used there, in order to do so. Before he installed them there, he had offered to equip two other factories with them without requiring royalties for their use, but these offers had been declined.

There is uncontradicted evidence of declarations by Plant in 1909 that his intention was to equip these two other factories and his own with his new machines and then sell out to the United Company. That the effecting of such a sale, and not any actual competition in the market with machines then in use, was his real purpose, is hardly left doubtful by the history of his subsequent negotiations with the defendants. These, set on foot by him and at first stopped by the defendants' unqualified rejection of his proposals, he persisted in renewing through various intermediaries, until they resulted in the purchase above described. It appears without contradiction that Plant was for a time under agreement to pay an influential shoe manufacturer, whose assistance he procured, $250,000 if he succeeded in bringing about the desired sale; also that he later offered, and ultimately

had to pay, a commission of 5 per cent on the price obtained to another intermediary, who undertook to put the transaction through for him.

The evidence regarding Plant's negotiations with the defendants sufficiently proves that they were never sought by the defendants, and [377] that there was never any attempt on their part to get Plant to sell them his inventions, or machines, or anything else, but that, on the contrary, all the efforts toward such a purchase were made by him. The first overtures toward it came from him; he began them soon after he had put his machines into the Plant factory; they led to interviews, all of which he sought, and at which his proposals were declined, without encouragement to renew them. Nowhere in the evidence is any indication found that, before Plant's overtures were thus made, any purchase whatever from him had been suggested to or considered by the defendants.

Whatever the merit of Plant's inventions, these machines in which he had first embodied them are not shown by the evidence to have been commercially successful in September, 1910, or to have been capable of such success in their then stage of development. They are shown to have been lightly built, not adapted to produce men's shoes, and by no means satisfactory in making women's shoes, the kind of work to which the Plant factory was devoted. The evidence is uncontradicted that, while operated there, they fell behind the United Company's machines, which they had supplanted, in efficiency; that breaking down and defective work was more frequent with them, and the cost per pair of making shoes with them distinctly greater. Though some of them, as later developed and improved by the United Company, proved to have merit, the most that can be fairly said of them in 1910, on the evidence, is that they were more or less promising experimental machines. There was no complete set of them for combined operation; for that purpose several important machines were yet to be developed. In the State in which the United Company took them over, they were not found capable of profitable use. Nothing is found in the evidence which affords reasonable support for the peti-

Dodge, C. J., concurring.

tioner's contention that they were "right at the threshold of extensive competition with the United Company."

The petition alleges that a group of shoe manufacturers were in conference with Plant, in Boston, in September, 1910, "with a view to purchasing an interest in his inventions and machines, or to make some arrangement which would enable them to obtain machines for use in their factories and thereby be relieved from the domination and control of defendants." It further alleges that the defendants were "advised of the purpose and intent of said manufacturers," knew that if they succeeded in making arrangements with Plant there would be further removal of their own machines and competition thus created, and agreed with Plant upon the purchase made from him in order to prevent such competition.

But the evidence fails to support these allegations. It does not charge the defendants with any knowledge, at the time they came to terms with Plant, of any negotiations between him and the manufacturers referred to. No reference appears to have been made to them or their doings during the defendants' negotiations with Plant, and no reason is found to believe that apprehension lest he might conclude some arrangement with them induced in any degree the defendants' final agreement with him. Were it important, it might be added that, so far as the evidence can be said to show anything regarding [378] Plant's intentions toward them, it shows that he never really meant to enter into any arrangement with others if he could get the defendants to take off his hands everything which he desired to sell; and no purchase so extensive as this appears to have been at any time contemplated by the manufacturers mentioned in the petition.

The terms finally agreed on with Plant were so much more favorable to the United Company than any he offered when he first approached them, and so inconsistent with his previous attitude toward them, as to leave no reasonable ground for believing that the defendants had ever sought, expected, or planned for the transaction as carried out. And in what they were thus unexpectedly enabled to acquire from

him there was included so much that was plainly of far greater consequence to them than could have been the avoidance of such competition as they can reasonably be supposed to have apprehended from his incomplete and undeveloped line of inventions—patents and machines also included—as to leave no sufficient ground for believing that avoidance of competition was their principal motive in accepting the opportunity offered. The normal, natural, and obvious business reasons, of wholly different kinds, why they should accept instead of refusing it, appear to have been so complete and sufficient as to render the conclusion unreasonable that it was accepted in order to escape competition.

Six million dollars, half in cash and half in United Company common stock at twice its par value of $25, was the price finally accepted by and paid to Plant for everything acquired from him. In the transaction no separate valuation was set by the parties upon the inventions, patents, and machines transferred, distinct from that of the controlling interest in the shoe manufacturing establishment. That part of the acquisition is, of course, beyond criticism so far as the Anti-Trust Act is concerned. That it was of great value is shown beyond question by the dividends then and afterwards paid on the stock acquired by the United Company. These, and the ultimate disposition of the stock itself, afford every reason to believe its actual value, when acquired, sufficiently great to reduce the actual cost of the patented improvements, also acquired, to a comparatively small proportion of the total payment made to Plant. Taking the transaction as a whole, if the total amount paid by the United Company was large, the total value of all that was received in exchange also appears, not as matter of opinion merely, but by actual results shown, quite sufficient to negative any claim that the defendants paid an exorbitant price for what they got.

The evidence that among these patented improvements obtained from Plant there were enough of sufficient value, in the defendants' hands and used as they only could have used them, in further developing and perfecting machines they were then producing or trying to produce, to make this part of the total acquisition extremely profitable to the United

Company, was not met by any sufficient proof to the contrary. The agreement to take the patents and inventions was not made until after a careful examination and report as to their merits. The belief thereon founded that, used as above, they would be worth acquiring upon the terms proposed, is shown to have been justified [379] by the result; and the acquisition cannot be criticised so far as it was occasioned by that belief. As developed and added to its own machines by the United Company, some of the inventions acquired have proved to be of a value such as fairly justifies their claim that the patents acquired were the controlling feature of the purchase.

The evidence shows also, without serious contradiction, that one result of the bargain made with Plant was to relieve the United Company from an amount of litigation, then pending or in prospect, which would otherwise have burdened and hindered it to an extent far greater than it had ever had reason to apprehend from any litigation with which it had before been concerned.

A suit by it to restrain the Plant Company from breaking the leases of its machines, displaced in order to install the Plant machines as above, had been pending since May, 1910; and between Plant, or concerns wherewith he was identified, and the United Company, there were pending interferences, claims of infringement on both sides, and pending infringement suits, raising questions relating to his or its patents, so numerous, complicated, and important as to threaten interminable controversy.

It was part of the bargain with Plant, or followed from it as a result, that the above controversies were settled or avoided. That the prospect of accomplishing this result was a further normal, natural, and powerful inducement to the agreement made with him, cannot be reasonably doubted. In so far as the agreement was thus intended, no criticism of it can be valid.

The above reasons, none of them open to any charge of illegality, seem to me have been the really operative reasons which must have induced the defendants to enter into the Plant bargain upon the terms which he finally offered them. They appear so adequate, as legitimate business reasons for

doing this, as in my opinion to leave no reasonable ground for holding, against the defendant's denial, that it was really a purchase to suppress competition. No such competition, or prospect of competition, at the time, is proved as would justify such a conclusion. The competition threatened by Plant, and his efforts to induce the defendants, in order to avoid it, to buy his machines and patents by themselves, were wholly ineffectual. They met with nothing but refusal on the defendants' part to consider his proposals. It was not until he offered, through the intermediary he last employed (Smith), the shoe manufacturing business of the Plant Company as well, that the defendants consented to deal with him.

While it may have been his plan to realize a profit by threatening competition, it was not until this proposition, based upon tangible property of substantial value, and of patent rights, was made, that any sale was effected. The property acquired being proved to have been worth the amount paid, the argument that the defendants were so anxious to hold a monopoly as to be willing to pay $6,000,000, or any other large sum, in order to get rid of a competitor, or that this was done in pursuance of a general plan conceived in 1899, fails completely.

6. In paragraph VI of the petition a variety of acts described as "unfair and monopolistic" or "oppressive" are charged to have been |380| committed by the defendants since the formation of the United Company by means of the predominance it has acquired. Of these, as set forth, "threats" of various kinds form a considerable proportion. It is charged that by "misrepresentations and threats" the defendants have induced competitors' customers to leave them, and have deterred others from attempting competition; also that they have threatened to use their financial or other power to secure to themselves the patronage of competitors. Under the above paragraph heading it is also charged that the defendants have bought up many patents for valuable inventions and held them long in disuse, that they have offered and granted rebates to such users of their machines as use them exclusively, and that they have bought

out many competitors at exorbitant prices. There is a general charge of "many other unlawful acts too numerous to specify," and accordingly not specified, in the petition.

A long bill of particulars, containing alleged specifications of these charges, was filed upon the defendants' motion during the trial (June 25, 1913). But there are very many of the charges so specified in support of which no proof whatever has been offered. Of those to support which some evidence was introduced, comparatively few have been insisted on in argument. The charge that competitors have been bought out at "exorbitant prices" is found not established in the case of the Plant acquisition, as has just been stated. Nor is evidence found sufficient to establish it in the case of any one of the numerous minor acquisitions specified in the petition. It has not been insisted on in argument that this charge is proved as to any one of them.

Nor has there been any evidence sufficient to show a practice followed by the defendants of buying up patented inventions to hold in disuse. This charge also is one not insisted upon in argument.

The charge that rebates have been given to exclusive users of the United Company's machines rests upon (1) the vote of the executive committee January 29, 1900; (2) a circular letter addressed on the company's behalf to its lessees 10 years later—June 10, 1910. There is nothing sufficient to show that there was anything "unfair or monopolistic" about either the vote or the letter or about anything done in pursuance of either.

The vote in 1900 was that royalties on the Gem insole machines be rebated to exclusive users of the company's machines. It appears that, having acquired the Gem Company, which had machines in use under lease at the time at a royalty of one-half cent per pair, the United Company added the machine to its Goodyear auxiliary set, and to users of such sets paid back the one-half cent per pair in order to leave the rate upon the entire auxiliary set the same as before it included the Gem machine.

As to the circular letter of June, 1910, it announces the company's intention of investing 15 per cent of the royalties paid by lessees of the Goodyear welting, stitching, and turn

sewing machines for three years, in the company's common stock, and of distributing this stock proportionately at the end of the term among those lessees who should have faithfully observed the covenants of their leases during that period.

[381] Neither of these acts on the company's part can be said to answer to the terms in which the charge of offering and granting rebates is made. That either act was inspired by the purpose of giving exclusive users of the company's machines an unfair advantage over those who did not, or that either had that effect, cannot be said to have been proved, and the charge is not believed to require further notice. It would seem to have been suggested by those cases relating to railroads, wherein "rebate" has acquired an obnoxious signification.

It remains to consider how far the evidence proves the defendants to have used "threats and intimidations" of the various kinds described in the petition. As to far the greater part of the specified instances set forth in the bill of particulars, the charges of this kind have been allowed to go wholly without attempt at proof. Of those regarding which any such attempt was made, six only have been insisted upon in the petitioner's briefs or argument. No reason whatever to believe that any greater significance could be claimed for any others of the specified instances than for these appears from the evidence regarding them to be found in the record.

Mr. Winslow, president of the United Company, Mr. Barbour and Mr. Hurd, vice presidents, all of them directors, are the only defendants charged in these instances with using any threats or intimidations. The other persons charged with making them are Mr. Bayley and Mr. Willson (since deceased), managers for the company at various times, but never made parties to this suit.

The only "threats" which Barbour is charged with making are testified to by James N. Darrah, vice president in 1900 of the Standard Shoe Machinery Company. According to Darrah, Barbour, at a talk in New York in April of 1900, tried to get him to sell out stock in his company by telling him, in substance, that, if competitors of the United

Company could not be bought out, they would be forced out. Barbour has denied that any such conversation took place. Darrah's evidence was not corroborated; and there is no proof that his concern, though it went out of business in 1901, was ever forced out or crushed by the defendants.

Mr. Winslow is charged, in testimony by Charles H. Morse, with having said to him at some time in 1901 or 1902, "You don't suppose we are going to allow you to put them on the market"—referring to certain pegging machines then being made by the Fifield Company, with which Morse was connected. Morse, on his own testimony, was then negotiating with Winslow about a sale of the Fifield Company business to the United Company, but they failed to agree as to price. Its business was sold in 1906, but not to the United Company. There is nothing to prove that the United Company ever interfered with the marketing of this machine.

Mr. Winslow is also charged, in testimony given by Charles S. Johnson, with having said to him during negotiations in 1902 or 1903, regarding a sale of the Tripp Giant leveler, in which he was interested, to the United Company:

"You had better sign that contract, because we are going to have your business anyway."

[382] But the negotiations did not result in a sale, and the Tripp Company's business, though sold out in 1905, was not acquired by the United Company. Not long after, according to Johnson's testimony, the United Company put on the market machines considered by him to be substantially the same as the Tripp Giant leveler, but there is no other indication of any interference with the Tripp Company or its business by the defendants.

Mr. Winslow is also charged, in testimony given by Merrick and Luitweiler, president and treasurer of the Union Lock Stitch Company, then developing machines not yet put on the market, with having told them in 1905, while attempting to persuade them to sell out to the defendants, that they would not be allowed to make any money, that the United Company would build their machines, that their business would come round to it and be taken by it, and that

it was cheaper to kill competitors than to acquire them. The alleged statements are denied by Winslow. The business referred to is one never acquired by the defendants, nor is any interference whatever with this business shown. This was admitted, and the testimony of the two witnesses named is that they have put out 350 to 400 of the machines in question.

Bayley, a department manager for the United Company, is charged, in testimony given by Irving A. Hadley, then representing Kimball & Hadley, manufacturers of awls and needles, with having said to him in January, 1904, in answer to a claim by him that Kimball & Hadley could sell needles as cheap as the United Company, that the United Company could give them way if necessary.

It does not seem possible to attach any serious importance for any purpose to the remark, if made, even if anything said at the interview can be supposed to have had reference to a possible purchase by the defendants of the Kimball & Hadley business. Bayley was in a sanitarium, unable to testify at the trial. Further testimony from Hadley, however, that certain factories had refused needles offered them by him for fear of controversy with the United Company, was contradicted by the managers he mentioned. The business of Kimball & Hadley was one of those acquired by the United Company, but it was not acquired until the following June. It consisted in making Goodyear needles, which, at the time of the acquisition, the United Company was not making at all. An attempt by Kimball & Hadley, in litigation with the United Company some time afterward, to prove that threats and intimidation had been used in acquiring their business, wholly failed. See *United Co.* v. *Kimball*, 193 Mass. 351, 79 N. E. 790.

Mr. Hurd is charged, in the testimony of Harry E. Cilley, with having said to him in 1901, during a conference with respect to a possible sale of his business to the United Company:

"You can't do any business except on our sufferance, and you can't get a new dollar for an old one."

It appears that Cilley's business at the time consisted in building a sole-leveling machine, that he was not satisfied

Dodge, C. J., concurring.

with an amount suggested by Mr. Hurd as a proper price for it, told Mr. Hurd he con[383]sidered it "outrageous," and never renewed the negotiations. Neither the business of this witness nor the remarks testified to, if made, can fairly be regarded as of any serious importance, in view of all the circumstances shown.

It thus seems clear that nothing proved as to the above instances of so-called "threats and intimidations" is sufficient to justify such allegations as are made in paragraph VI of the petition about them. Even if anything said by a representative of the United Company on these occasions can properly be called a "threat," in view of all the surrounding circumstances shown, there is certainly no adequate reason established for believing that any competitor's customers have been induced to abandon them or that anybody has been prevented from attempting competition, by what was said. The instances relied on are widely separate in time and distinct as to circumstances and persons. They cannot reasonably be regarded as showing a concerted purpose to suppress competition through intimidation, such as paragraph VI purports to charge. In every instance the expressions said to have been used by a representative of the United Company were in interviews with persons interested in some concern or machine which the United Company was asked or might be asked to buy. As has appeared, propositions of this kind were constantly being made to its representatives, and many more of them were refused than were accepted.

Not in paragraph VI, but in the preceding paragraph V, of the petition, the charge is made that certain provisions of the leases under which the United Company's machines have been operated by users have been arbitrarily enforced, in pursuance of a general policy and practice to refuse machines for failure to comply with the terms and spirit of the leases "and to otherwise injure" users so failing to comply.

In the above bill of particulars filed, as has been said, on June 25, 1913, "in amplification of section VI of the petition," the defendants are charged, in a number of specified

Dodge, C. J., concurring.

instances, with threatening to remove or removing machines from the factories of users, because competing machines or machines obtained from other concerns were also being there used or because such use of other machines was in contemplation. No proof whatever has been offered as to a considerable proportion of the instances thus specified.

In the instances specified regarding which there is some proof, nothing more is shown than that the United Company insisted, to a greater or less extent, upon observance by the lessee of provisions in his lease to which he had expressly agreed when he took the machine, and which he was purposely violating or proposing to violate to the detriment of the lessor, because such violation would tend to decrease the number of pairs of shoes operated on by the machine and thus the royalty to be paid for its use by the lessee.

If the provisions referred to in the leases are contrary to law, it was unlawful to insist upon them. The question here involved is later considered. But unless the provisions were unlawful, the evidence regarding these specified instances in which their observance was insisted upon wholly fails to show that in any instance the defendants did [384] or attempted anything whereof either the lessee of the machine or anyone else had any right to complain.

It may be said generally that the instances in which machines were in fact removed from the factories of lessees under the provisions referred to have been so few in proportion to the total number of leases as to leave the general charge that such provisions have been arbitrarily or oppressively enforced destitute of any sufficient foundation. Only five such cases appear in the evidence. In each, the lessee's conduct was in willful disregard of the lease agreements, and afforded a complete justification for the lessor's action, unless none is possible.

The bill of particulars filed June 25, 1913, brought into the case for the first time allegations that the defendants have endeavored to organize strikes in factories of shoe manufacturers wherein shoe machinery competing with their own was operated.

Dodge, C. J., concurring.

The only specifications under this charge are, in substance, that in June, 1910, Willson, then general manager of the United Company, assured certain employés of the Thomas G. Plant Company that, if they would organize a strike in that factory, the United Company would pay all expenses and reward the leaders "handsomely"; that, in reliance upon said assurance, about 300 of the operatives were brought into such an organization and a large sum of money expended by the organizers; that Plant thereupon had the organizers watched, and no strike resulted.

The only evidence to show that Willson ever gave any such directions or assurances came from three witnesses, employés at the Plant factory in June and July, 1910, who gave their testimony in person before the court. No one else was present, according to their statements, at the various interviews they described between Willson and themselves during the two months just referred to. Willson having died in 1911, and before these charges were made, no direct contradiction was possible of their statements as to what was said by him to them.

He told them, according to their testimony, that if they would organize a strike at the factory, and give him all the information they could about the Plant machines, he would pay their expenses, get them jobs, and pay them also $2,000 in cash, according to two of them—$1,000, according to the other.

Willson never did pay them any money, as they all agreed. But their testimony was that they got about 300 men into an organization and spent about $1,500 of their own money in doing so, mainly in entertaining the men who joined. According to their further statements, $600 was contributed by one of them, $500 by another, and $400 by a third; their wages at the time were $15 per week; these sums were the savings of 11 or 12 years; accounts, lists, and vouchers, containing details of their doings and expenditures, were kept; but all of these were either surrendered to Willson or destroyed by them. No written evidence of any kind was offered in support of their story.

It appeared that there was some prospect of trouble between Plant and the employés at the factory at the beginning of June, 1910, but after meeting a committee with regard to an increase of pay asked for, Plant granted it and no strike or other trouble ever occurred. [385] There was no proof whatever that he ever employed detectives to watch the three witnesses in question, or that any attempt by them at organizing a strike ever came to his knowledge.

The testimony of these three men was not corroborated by any others of the then employés at the factory. On the contrary, several of them, shown to have had ample opportunity for knowing the facts, had there been any such organization attempted as testified to, denied any knowledge of such organization or of any such preparation for a strike.

Winslow, president of the United Company, testified that Willson had told him, in June, 1910, that three Armenians had been to him asking that he furnish them with money to start a strike in the Plant factory, and that his instructions to Willson thereupon were to have nothing to do with them. No money of the United Company was ever paid out for any such purpose.

Not only does the evidence of these three witnesses appear unworthy of belief in view of its improbability, its lack of corroboration, and the evidence tending to discredit it, but it is difficult to understand how the petitioner could seriously have expected the court to accept such testimony or have considered itself justified in offering it.

The history of the proceedings in this case indicates that efforts which may fairly be described as extraordinary have been made to bring before the court, so far as possible, all sayings or doings of any of the numerous defendants or their representatives, during the period beginning with 1899 and ending with 1911, which might afford ground for charging them with oppressive, coercive, or like unfair conduct toward competitors of the United Company or the public. In view of the long period and wide fields thus searched, the numerous abandoned attempts to prove something of the kind above indicated, and the insignificant result of the evidence actually offered and finally relied on, the con-

clusion seems fully justified that the policy and methods pursued by the defendants and by the United Company have been, in general, above reproach in any of these respects.

7. It remains to consider the charges made in the petition as to certain provisions in the leases and license agreements, under which the United Company permits the use of its patented machines, that they are either unlawful in themselves or have been devised, adopted, and used by the defendants for the purpose of destroying competition. (Paragraph V.) Upon these charges the petitioner may be said to have finally put its main reliance.

With regard to the provisions in question, as with regard to many of the matters heretofore considered, the position finally taken by the petitioner has differed widely from that originally taken in the petition as filed.

None of the constituent companies were, in 1899, selling outright the patented machines they manufactured. The bill alleges the contrary, and charges that one of the steps taken after 1899, in pursuance of the alledged scheme to restrain or monopolize, was to discontinue sales and compel leases. An attempt to support this charge by evidence wholly failed. Nothing of the kind was done, nor is it [386] easy to see what grounds for making the charge could ever have been supposed to exist.

It appeared, on the contrary, that the method of marketing their patented machines followed by the constituent companies in and before 1899 was exclusively that of leasing for a royalty upon each pair of shoes whereon the lessee should use the machine. Some of the leases also required an initial payment; others did not. The evidence also shows that the general system of leasing in this manner was and had long been the usual and accepted method of dealing between the makers of patented shoe machinery and those desiring to use their machines, and that, in its main features, it had thus become so widely and firmly established as to render the substitution of a different system practically impossible.

The defendants continued the policy which they found in use by the constituent companies as to the kinds of ma-

chines to which this case now relates. Its machines of these kinds have never been sold outright; all users have taken them from the United Company upon leases granting the right to use the patented improvements embodied in them during the term of the lease.

It should be stated here, however, that, as its business has progressed, the United Company has developed a very large number of machines of other kinds useful in shoe manufacturing, as to which the policy of leasing only has not been followed. Such machines, included in what is known as the company's "General Department," have been and are sold outright to anybody willing to buy them, without restriction of any kind—a course of business more liberal than that pursued by either component company. The number of different machines wherein the United Company deals in the manner stated has come to be very considerable.

There was finally no contention that any law has been violated merely by the company's continuance of the policy of leasing only instead of selling.

That there was any violation of law in continuing, as the United Company did for a time after 1899, to maintain the leasing system and use the forms of leases which they found in use by the constituent companies, the petitioner is not in a position to contend.

There were suggestions in argument on its behalf that the system referred to was unlawful in some of its features, but the petition contains no such allegations. The claims therein made relate wholly to the leases put into use by the United Company after 1899 and rest on the proposition that these contain provisions "not found in [the] former lease and license agreements," the new provisions complained of being immediately thereafter specifically described. The petition characterizes them as "arbitrary, oppressive, and unreasonable." (Paragragh V.)

The United Company, of course, became, after its formation, the sole lessor of all the patented machines formerly leased by the different component companies. During the 12 years which then followed before this petition was filed there were, as is not denied, changes from time to time in the lease forms used for leases under which the use of cer-

tain of its machines were permitted. Generally speak-
[387] ing, one form was used with all leases of the same machine. There were some machines which might be taken under either of two alternative forms.

According to other allegations in the petition, it was part of the defendants' unlawful project, at the time of their combination in 1899, to refuse to sell or lease any essential machine except on condition that the lessee buy or lease of them practically all other machinery necessary or useful to him as a manufacturer of shoes. No proof was offered at any stage of the case that the defendants had in mind, in 1899, the system of leases they later developed, or any of the modifications therein involved of the system which they found established in 1899.

At the argument the admission was made, on behalf of the United States, that there was no proof that, at the time they formed the United Company, the defendants "had in mind the adoption of the system of leasing which they later developed." And the position then taken by the petitioner in argument was that the leasing system referred to has resulted in illegal restraint or monopoly, and that the intent which prompted its development is therefore "absolutely immaterial."

As to the allegation that the defendants contemplated a policy of refusal to lease, except on condition that the lessee buy or lease of them "practically all other machinery of whatever kind necessary or useful" to him as a manufacturer of shoes, it requires no further notice, now that the charge of restraint or monopoly in "any and all kinds of shoe machinery" has been abandoned. The evidence abundantly shows that nothing of this kind was ever contemplated, attempted, or done, and that there was never any justification for the charge as made.

With regard to the modifications introduced by the defendants upon the leases in use by the constituent companies in 1899, the petition alleges in substance: (1) That under the former system lessees from one company were not held to the exclusive use of machines manufactured by any of the others. (2) That since 1899 the defendants have re-

quired their lessees, by provisions not found in the leases previously used, "to agree to use exclusively one or more of the classes of machines included in said group of machines owned and controlled by them, upon penalty of having all the machines included in said group, so leased to them by defendants, immediately reclaimed and taken away and the lease and license agreement cancelled." (3) That lessees are now obliged to hire each machine for a period of not less than 17 years. (4) That lessees are now compelled to obtain all duplicate or repair parts, extras, etc., from the defendants at exorbitant prices; (5) also to pay return charges at the expiration of the lease, sometimes amounting to the original cost of building. (6) That the defendants now reserve to themselves in each lease the right to terminate all existing leases between themselves and the lessee upon his failure to use exclusively and to full capacity any machine leased to him by defendants. (Paragraph V.)

The evidence failed to show that lessees from the United Company had ever been compelled to pay exorbitant charges for repair parts, [388] etc., or to pay any unreasonable return charges on leased machines. (4) and (5) of the above alleged modifications may therefore be now disregarded. In the subsequent sections of the petition no further reference to them is found.

In the "conclusion" section of the petition, the following only, among the provisions thus alleged to have been added to the leases by the defendants after 1899, are charged to have been unlawful: Agreements by the lessee (1) that he would use exclusively machines of the lessor to perform the same kind of work as that performed by the machines leased; (2) that he would use in work other than that for which the leased machine was designed only machines of the lessor; (3) that, if the lessee should violate either of said agreements he would forfeit the use not only of the leased machine, but others, whether accomplishing the same or different work; (4) that he should use the machine leased for 17 years.

The objections made by the petitioner, at the argument, to agreements contained in the United Company's leases were

not confined to those specified in the petition as above, but included others nowhere therein referred to.

At the argument, certain clauses extracted from the leases shown to have been used by the United Company were said to embody the agreements objected to as unlawful.

By what was referred to as the "full capacity" clause, lessees agreed to use the machine to its full capacity on all shoes, etc., made by them in the manufacture whereof such machinery was capable of use.

By what was referred to as the "additional machinery" clause, lessees agreed that for any more work than their then leased machines could do, of the kind which machines belonging to the same department could perform, they would lease enough others to perform it from the lessor.

To neither of these two clauses was any reference made in the petition itself, as appears from the above summary of provisions in the leases therein complained of. The other clauses referred to at the argument were the following:

By what was referred to as the "exclusive use" clause, lessees agreed that, if they should cease to use exclusively machines leased from the United Company for doing work of the same kind upon shoes, etc., made by them, the lessor might, at its option, terminate all their leases of its machinery for doing work of that kind.

By what was referred to as the "prohibitive" or "tying" clause, lessees agreed that the leased machine should not be used upon shoes, etc., whereon certain other specified operations had been performed by machines not leased from the United Company.

By what was referred to as the "right to terminate all leases" clause, lessees agreed that failure on their part to observe any condition, either of the lease of the particular machine, or of any other lease from the United Company then in force, should give the lessor the right to terminate all leases of its machinery then held by them.

The above three clauses, and the alleged agreements requiring lessees to use the leased machine for 17 years, appear to be the only **[389]** provisions among those commented on in argument to which objection was made in the petition itself.

As to the use of such agreements as are expressed in the "full capacity" clause or the "additional machinery" clause, whereof, as has been stated, no complain is found in the petition, the evidence shows that they were not new introductions by the United Company, but were contained in certain of the leases used by the component companies before 1899.

By neither was any agreement made which the evidence has shown to have been abnormal or unusual, or to have exceeded what was reasonably necessary to protect the lessor's interests in the contemplated use of its machine.

The lessor might well accept for the use of its machine a smaller royalty per pair, based upon the understanding that the machine would turn out as many pairs as its capacity permitted, than it could afford to accept without any such assurance.

Similar considerations apply to the "additional machinery" clause. Without it the lessee would be at liberty to do his slowest and most difficult work on the leased machine and the easiest on others or by hand.

The petitioner, indeed, conceded that both the above clauses might be unobjectionable had they not been used together with the others; but it relied upon their use with the others as tending to show the existence of an unlawful scheme. That this is an afterthought only is shown by the failure to set forth either clause in that aspect in the petition. Moreover, as to the "additional machinery" clause, the defendant had discontinued its use altogether two years before the petition was filed, a fact inconsistent with any claim either that it assisted monopoly or was intending to do so.

The consideration of the remaining clauses raises, in the first place, the question as to the truth of the allegations in the petition that such provisions were not found in the leases used before the consolidation of 1899, but were modifications thereafter introduced by the defendants, in pursuance of their alleged intent to monopolize the business.

The following facts appear regarding the leases in use by the component companies before 1899:

In the case of the more important machines an initial payment, of greater or less amount, was required of the lessee in addition to the royalty per pair stipulated in the lease. Such initial payments were required by all the leases from the Goodyear Company. The Consolidated & McKay Lasting Company required such an initial payment in leases of two out of the five patented lasting machines wherein it dealt; in its leases of two others no initial payment was required; and its remaining machine was leased either with or without initial payment at the lessee's option, the royalty being higher in the latter case than in the former. The McKay Company was the only one of the component companies whose leases did not require initial payments, whether those of the patented heeling or metallic fastening machines, which it made, or those of the Davey pegging machines, which it controlled.

[390] It may be further stated, with regard to the leases made by the constituent companies, that two or more machines of the same company, intended for use in substantially the same operation, were generally leased as a group. Thus Goodyear Company leases required its welter and outsole stitcher to be used together, and permitted the auxiliary machines intended for use therewith to be used only on shoes welted and stitched thereon. As to its Ideal laster, the use thereof on welt shoes was restricted to use with its welter and stitcher. The leases of this company did not provide that the lessee should use its machines exclusively, and that unless so used the lease should terminate; but there were such provisions in the leases of the other companies. The Lasting Company's leases required use to the full capacity and the taking of additional machines for any additional work.

All the above leases were for terms for the most part either indefinite, or until cancellation by the lessor, or for the life of the patents embodied in the machines, or for 17 years and thereafter during the life of any patent embodied.

In the forms of leases or license agreements which they found in use as above, the defendants made no change whatever until about a year had elapsed since the formation

Dodge, C. J., concurring.

of the United Company. This the evidence shows without contradiction, and it further shows that when there were substitutions of new forms of leases in place of any of those in use as above, there was no change made all at once or in pursuance of any general plan, still less of any arbitrary plan, but, on the contrary, the change in each case was because special circumstances affecting the particular group of machines had come to render such change desirable.

The history of the successive changes adopted, and of the reasons for each, was fully brought out in the evidence. Beginning with the first new lease form, adopted in March, 1900, the adoption of others followed at various times during the subsequent years. Some of the provisions most objected to by the petitioner were not adopted until 1904 or 1905.

Regarding the various modifications so introduced, it may be said in general that they tended to relax previous restrictions upon the use of leased machines, and to reduce the cost to the lessee of installing them. The most important changes made were, in substance, as below:

For agreements whereby the lessee expressly promised exclusive use of the lessor's machines belonging to the same group with that leased, there were substituted options to cancel, reserved to the lessor, in case the lessee should discontinue such exclusive use.

The requirements found in leases used by some of the component companies that the leased machine should be used to its full capacity were extended to apply, in general, to all such machines, of the classes involved in this case, as were used in factories to measure the amount of work done, and thereby fix the amount of royalties to be paid upon the machines used in doing it.

As to certain groups of machines, provisions were introduced restricting the lessee's use of all machines belonging to the group to use only on shoes operated on by one or more of the other groups of [391] United Company machinery. But in all such cases, without substantial exception, there was also offered an alternative lease form not containing such restrictions. An initial payment was required from all

Dodge, C. J., concurring.

lessees preferring the latter form; no such initial payment was required from lessees under the form first mentioned.

A uniform term of 17 years was adopted for all the leases.

Considering the clauses objected to in the light of what preceded them and of the circumstances attending their adoption by the defendants, the petitioner has not, in my opinion, proved that the defendants' object in adopting them was the prevention of competition by others. Such prevention might indeed follow from the more favorable terms offered lessees, but modifications made in the existing system for the direct purpose of otherwise better adapting it to exclude competitors would have been different in character from the modifications represented by these clauses.

Not only would it have been unreasonable, as has been said, to expect the defendants to substitute a wholly different system from the leasing system which they found in use, but the evidence affords no reason to believe that anything of the kind was desired by manufacturers in general. The advantages to them of not having to tie up capital in patented machines and of paying for the privilege of their use only according to the amount of use were advantages which they cannot be supposed desirous of surrendering.

Modifications in the contracts offered them tending, as these are shown to have done, to enable the company, through provisions adapted to increase the number of shoes worked on by each machine, to lessen the royalty charged per pair, and to diminish or dispense with the initial payment before required, were so obviously prompted by the purpose of developing the company's business through the perfectly legitimate method of offering them on terms more advantageous to users, that it would be unjust to treat them, on evidence no stronger than that here presented, as really intended to accomplish an arbitrary exclusion of users from any dealings with others.

If it were made to appear that the leases containing these clauses accomplished in and of themselves an unlawful restraint of trade, or necessarily secured to the defendants an unlawful monopoly, the intent to accomplish these results would, of course, be imputed to the defendants without re-

gard to their actual purpose in adopting and using them. But the evidence seems to me insufficient for the conclusion that such results are so accomplished. The contention that they are fails, in my opinion, to take into account the defendants' rights in the field lawfully secured to them in the various patented improvements they had lawfully controlled and combined, and fails also to concede them proper scope for the rights properly incidental to their control of said improvements, to make such agreements with their lessees as would best promote the efficiency in combined operation of the machines leased, and thereby best enhance and safeguard their just return therefrom in the form of royalties.

The complaints made regarding leases embodying the clauses referred to are not directed against those pertaining to any particular [392] kind or kinds of machines, as more objectionable than others. It is their entire combined effect which is attacked.

Concurring as I do in the views expressed regarding them by Judge Brown, I am obliged to regard the petitioners' allegations of their illegality as not sustained by the evidence.

In my opinion, the bill should be dismissed.

Brown, District Judge.

The United States charges that certain provisions in the lease and license agreements of the United Shoe Machinery Company with shoe manufacturers restrain interstate commerce and tend to create or perpetuate a monopoly of interstate commerce in shoe machinery.

We may examine this topic, which comprehends a large number of very long and elaborate documents and a very large portion of the briefs and arguments on each side, most conveniently by considering the effects which the United States claims result from such provisions, rather than by attempting to set forth in full the provisions themselves.

Complaint is made of the effect of such provisions:

I. Upon the shoe manufacturers.

II. Upon other manufacturers of shoe machinery.

The rights of these two classes and the effect of the leases upon each present quite distinct questions. The only com-

petitors, or possible competitors, are other manufacturers of shoe machinery. The shoe manufacturers, as such, are not competitors. As the complaints of the United States on behalf of the shoe manufacturers and on behalf of other machinery manufacturers relate to distinct matters, they should not be taken cumulatively and should not be confused.

THE EFFECT OF THE LEASES UPON THE SHOE MANUFACTURERS.

This may be considered in three aspects:

As bearing upon the question of the legality of the original combination or organization of the United Shoe Machinery Company.

As an alleged illegal and oppressive outgrowth of power obtained by combination.

As restricting the shoe manufacturer's freedom of choice in taking the machines of other manufacturers, as preventing him from using the machines of others, and as compelling him to use the machinery of the defendants.

The petition of the United States charges that the defendants—

"conceived the idea of acquiring the ownership or control of all concerns engaged in manufacturing and dealing in any and all kinds of shoe machinery, and then to refuse to sell or lease any of the essential machines to the manufacturer of shoes except on condition that he buy or lease of them practically all other machinery of whatever kind necessary or useful to such manufacturer of shoes, and thereby to exclude all competition by other manufacturers of such shoe machinery and to monopolize the trade and commerce therein among the States and with foreign countries."

It is also alleged that certain lease and license agreements constitute steps in carrying out such project.

It is urged in effect that such plan comprehends a denial to shoe manufacturers of such opportunities to obtain machinery as existed [393] before the consolidation, and a compulsion upon them, if they desire a special kind of machinery, to take also other machines of different kinds from the defendants.

There seems to be in the case no other basis for such allegations than the leases themselves.

This bill was filed December 12, 1911, before the decision in *United States* v. *Winslow*, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481. In that case the argument of the United States as to the so-called "tying clause lease" shows a conception of the character and effect of the leases similar to that set forth in the bill of complaint in the present case. It was supposed that the effect of such leases was to compel customers to take all of their machines from the defendants, or all from other sources, and that this was a direct restraint upon competition and trade by depriving them of the existing right to use some machines without also using others.

The argument as to the effect of the leases both in *United States* v. *Winslow* and in the present case seems to be based rather upon an ingenious theory of bringing the defendants within the Sherman Act than upon any proper interpretation of the leases or accurate information as to the facts.

The union of non-competing businesses in a single company would appear to have no tendency in itself to suppress competition. The union in a single company of distinct companies dealing in distinct patented inventions for performing different operations would seem remote from the sphere of the Sherman Act. To charge defendants, who were engaged in the manufacture and sale of patented machinery, with an attempt to monopolize, had little plausibility in the face of the fact that grants of monopoly had been made by the United States.

The alleged plan of a refusal of what before could be had separately, as a means of compelling the taking of other machines, was a principal ground for invoking the Sherman Act.

The leases in evidence, as documents, fail to substantiate the charges either as to the contrivance of such a plan, or as to its execution. It appears that after the consolidation there was no refusal, or imposition of conditions as alleged, but that the defendants continued to give manufacturers terms which were substantially the same as before, and in some instances better than those offered by the constituent companies before the consolidation. This is shown not only by the exhibits of "independent" leases, but by the testimony of officers of the company.

Brown, D. J., concurring.

The charge seems to have been based upon certain so-called "tying clauses." There has been some confusion as to the scope of the term "tying clauses." The United States gives the following definition:

"'Tied to' means that machinery cannot be used in the manufacture of boots and shoes with machinery other than that owned and controlled by defendants."

This seems to require consideration of clauses of two kinds:

(*a*) The "exclusive use" clause.

(*b*) The "prohibitive" clause.

The "exclusive use" clause reserves to the lessor a right to cancel the lease in case the lessee shall fail or cease to use exclusively ma[394]chinery of the kind leased. This kind of tying has no direct bearing upon the question of the legality of the combination. What was before separate is separate after the consolidation.

The "prohibitive" clause provides that the leased machinery shall not be used in the manufacture of shoes that have been, or are to be, operated upon by machines of certain specific kinds, not leased from the lessor. Though a similar clause was in use before the consolidation, it related only to machines of the kind made by one of the constituent companies. After the consolidation it related also to machines of other kinds formerly made by other of the constituent companies.

The prohibitive clause, therefore, is the one that has relation to the supposed scheme of using the power acquired by combination to refuse machines that before were separately obtainable, and to offer such machines only on condition that other machines of different kinds should also be taken.

"Tying," therefore, does not mean that the manufacturer is required to agree, or agrees, not to use the machines of others, but merely that he has secured only limited rights of use, and that if he exceeds such limited rights he may lose his lease. It is not a question of the legal effect of the lease, but of the practical consequences of securing only restricted rights of use. The term is misleading in its implication that the manufacturer is bound by contract not to

use the machines of others. He is bound only not to use the leased machinery in violation of the terms of the lease. "Tying" is an inexact and equivocal term, which may refer merely to the machine, or may mean either that the lessee is bound by contract or merely is under strong practical inducement.

The restricted or prohibitive leases do not in themselves as documents prove the denial of the right to procure, as before, independent leases for individual machines. As matter of fact, independent leases which did give the right to use the machines with machines of other kinds, made by other machinery manufacturers, were always procurable This was the general rule, and if there were any exceptions they were, so far as appears, inconsiderable.

It is a result of the consolidation that the United Company offers more attractive contracts for a group of machines of different kinds than for machines of one kind only; but as it still offers the contract for machines of one kind on as good terms as before it is difficult to see how that is detrimental to the shoe manufacturers.

The charge of this supposed scheme to deprive former customers of the right to use some machines unless they would also use others seems to have originated either in the erroneous assumption that a prohibitive lease was the only kind procurable, and that the former customer had no choice, or in disregard of the fact that it was merely an alternative form of lease. As the leases prove no such plan, whether of the extent alleged or of less extent, and as the evidence proves the exact contrary of what is charged, we think that the United Shoe Machinery Company is, upon the merits, entitled to a full clearance from this charge.

It was, however, urged upon final argument, despite the decision in *United States* v. *Winslow*, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. [395] 481, that because the union of distinct lines in a single hand put it within the power of the company to devise and carry out such a scheme, the combination had such potentiality of evil that it should be disintegrated. This argument extends beyond reasonable limits the import of certain expressions of the Supreme Court in

cases where there was such combination of competitors as to eliminate competition. This was within the statute, though none of the evils resulting from destruction of competition might yet have ensued.

In this case the mere consolidation of non-competitive businesses did not suppress competition, nor deprive customers of rights previously given by the constituent companies, and has no necessary or probable tendency to develop such a scheme as is unjustly attributed to the defendants. There must be added to the combination, from which naturally no such results would flow, an entirely new scheme.

The defendants having completely answered the charge that they devised or carried out such a scheme, the rejoinder that they might have devised and carried it out if they saw fit is entirely too far-fetched to bring the defendants either within the terms or within the spirit of the Sherman Act. Not only is there a failure of proof of the existence of such a scheme or of such a practice, but there is strong evidence to the contrary: not only in express denial, but in the undisputed fact that the defendants' Goodyear welter and stitcher have never been put out on leases that prevented their use with machines of other kinds obtained from other manufacturers. These are the most important of the defendant's machines and the center of its system; they are the principal royalty paying machines, and are furnished with a recording appliance to determine the number of shoes operated upon. The denial of their unrestricted use would have best served the alleged purpose of forcing the use of other kinds of machinery. The fact is that after the consolidation, as before, these machines, which the complainant's expert testifies are the only essential machines, and which are essential only if a shoe manufacturer chooses to make the special kind of shoes for which they are specially adapted, rather than shoes of other kinds, were put out only upon leases which did not contain the prohibitive clause.

The validity of the combination, therefore, is in no wise affected by the subsequent use of the prohibitive clauses.

We may next consider whether the shoe manufacturer who has chosen to take a lease permitting only a restricted or

Brown, D. J., concurring.

limited use of a particular machine is in any way injuriously or improperly affected by the fact that the businesses which before were in separate hands are now in a single hand.

It can not be denied, and is practically conceded by the United States, that the "prohibitive clause," which is said to have the practical effect of tying together machines of different departments, is a limitation of the use of patented machines. The licensee has no right beyond the express provisions of his license, but is not bound by contract to take a machine for the performance of any other operation. If he desires to use for certain other operations the machinery of other manufacturers, he is met by the fact that the lease he has chosen, because it has **[396]** been offered upon better terms than an unrestricted lease, gives him no right to continue the use of the leased machine. This, of course, may constitute a strong practical inducement to take other machines for other operations from the defendants, rather than from other manufacturers. This inducement will be as strong as his desire to retain his lease. This, then, becomes not a legal, but a business, proposition.

The shoe manufacturer may untie the leased machine by taking another form of lease, which contains no restriction but requires an initial payment—though the royalties are the same. The amount of the "initial payment," which is a defined sum of money, seems, therefore, to constitute both the inducement to choose the restricted lease and the deterrent from changing a lease once taken for an independent lease.

This reduces the matter to one of dollars and cents. The defendants charge more for a machine used with machines of other manufacturers than for machines used as a part of a defined group of defendants' machines. Had they not combined the different companies they would have no occasion to do so.

The attack of the United States upon the "tying clause" makes no distinction between new machines which originated with the defendants and those in existence before the consolidation. There is, moreover, no attempt to show that the cost of independent machines has in any respect been

increased since the consolidation, and the evidence from the defendants is to the contrary. Nor has the United States made any attempt to show by evidence that the prices charged for independent or unrestricted leases are excessive, or such as to prevent the manufacturer from using them profitably. The necessity of meeting the defendants' showing that there is no substantial obstacle in the way of a manufacturer who may desire to equip different departments with machines taken both from the United Shoe Machinery Company and from other manufacturers is recognized by the United States, and the brief states:

"The amount of the initial charge for installing machinery under the so-called independent lease, and the cost for changing from one form of lease to another, is so excessive as to restrain the manufacturers from choosing the independent system and to coerce them into taking the restricted forms."

Under this heading the United States relies merely upon the difference in price between the independent lease and the restricted lease. This is fallacious and does not meet the point. If the prices for independent leases are reasonable prices, if the shoe manufacturer can obtain what he could before and upon reasonable terms, the fact that he and others are offered better prices for prohibitive leases is, of course, immaterial.

It is very earnestly contended that by this clause a shoe manufacturer is "bound hand and foot" and "is obligated" to take other machinery from the defendants. But when we consider that he has voluntarily chosen the limited right to use and has merely declined to pay the price for the unlimited right to use, that he has got all he was willing to pay for, it seems fair to say that the only restraint upon him is the fact that he cannot make use of another's property without his consent, and that this consent will cost him money.

[397] It might well be said upon the authority of *Henry v. Dick Co.*, 224 U. S. 1, 35, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, that the patentee's right embraces the lesser right of permitting others to use upon such terms as the patentee chooses to prescribe, and that the reasonable-

ness of the terms offered for unrestricted use is not open to inquiry. But surely, if the argument is made that there is coercion through an excessive price, such an argument can have no weight whatever for any purpose legal or ethical unless the fact that it is excessive affirmatively appears. From such evidence as is presented in this case as to the amount of initial charges upon independent leases we can draw no support for the charge of coercion through excessive charges.

The United States contends that the fact that independent leases are also offered is immaterial, and that the validity of the prohibitive lease must be determined upon its terms alone. But this contention is clearly wrong. The tying of which complaint is made is merely the practical effect of the shoe manufacturer's choice of a restricted rather than an independent lease. When he wishes to provide himself with machines for other departments, his choice of the machines of other manufacturers may result in displacing machines leased from the defendants. If, however, he may still obtain the defendants' machines by the payment of an initial charge, then the only restraint upon his free choice is the sum of money required to retain such of the defendants' machines as he has already installed. When a factory is equipped in the first instance with defendants' machines adequate in number for all departments, the choice between independent and restricted leases is a question merely of the comparative cost of installation. After a special equipment is outgrown and there arises a demand for other individual machines to supplement it, then the manufacturer may desire a partial equipment with other machines of other manufacturers. Here arises from the prohibitive clause the substantial obstacle above referred to: That the installation and use of such machines may result in the removal of the whole equipment which he has taken from the defendants.

But the situation is one that can result only from a direct violation of one or more of his leases. While this may seem a harsh consequence of a breach of contract or of an infringement of the defendants' patent rights, it cannot be said to touch the question of the validity of the prohibitive clauses.

Even should we regard the agreed consequences of a breach of contract as serious, this does not relieve us from deciding the question whether the contract in itself is valid.

As it is not the purpose of the defendants to take their machines out of factories, but rather to put them in, we must consider those clauses which are designed to induce their installation, rather than those clauses that are designed to prevent a breach of contract, or which reserve a right to terminate the leases upon an infringement of patent rights.

We may assume that the prohibitive leases with the reduced prices are adopted by the defendants as an inducement to the manufacturer to take also several different kinds of machines, and that, having once taken a restricted lease, the manufacturer remains under a strong in[398]ducement to take machines of other departments from the defendants and not from other shoe machinery manufacturers.

The United States contends that the patent laws confer upon the owner of a group of machines, each protected by a distinct patent, no right to handle the entire group as a unit, thus making one patented machine aid another.

It is true that the right granted to the patentee to exclude others from the use of his patented invention is confined to the subject matter of that invention. It does not include the right to exclude the use of any other machine, patented or unpatented. When, however, a patentee has installed in a factory several distinct machines, each upon a restricted lease, he has as to each a full right of exclusion from other than the licensed use, and thus may legally exclude all machines that compose the group. But the proposition that patented machines cannot be handled as a group is stated too broadly. If what was before in separate hands is grouped in a single hand, and handled only as a unit, this might result in a refusal of what before was obtainable. But if the patented machines are handled both as individual machines and as a group, so that there is a free choice between the taking of individual machines and a group, we see no ground for objection.

One patented machine may be made to aid another in two ways: By using a refusal to deal with them separately as a

means of compelling the taking of both; or by offering both at a lower price than the sum of the separate prices for each. The first is the way charged in the petition, but disproved as matter of fact; the second is the common device of wholesaling instead of retailing.

Were the defendants exercising merely the ordinary rights of owners of property it could not be said that an entire contract concerning a group of such machines was illegal.

It is conceivable, if a single person should assemble in his hands a large number of distinct patented articles previously upon the market and refuse to sell any unless all were taken, that is in special circumstances might constitute such obstruction to a former freedom of trade as to fall within the Sherman Act. Where the patented machines were originated and first put upon the market by the defendants, it is difficult to find any reason why they should not be grouped; but where there is no obstruction to a former freedom of trade, where there is no refusal of any article upon the former terms, it cannot be illegal to offer a group for a price which is lower than the sum of the separate prices—or, what is the same thing, to offer each article at a lower price if other articles also are taken at a lower price.

We are unable to see that a shoe manufacturer has any just cause of complaint that the defendants offer him and their other customers restricted leases. One who refuses these leases, and takes the independent leases, may complain that other shoe manufacturers are getting their machinery on lower terms; but the royalty rate will be the same, and the cost of initial payments is fixed and may be weighed as against the estimated value of taking machinery from other manufacturers. It is a mere question of dollars and cents. It is legal for the defendants to discriminate in price between customers who take [399] large amounts and those who take small amounts. In fact, it appears that certain large manufacturers have contended that it was unjust to them to fix the same royalty for a large manufacturer as for a small one, which has been the practice of the United Company.

We conclude, then, although the prohibitive leases, in so far as they tend to group together machines of different

departments, may be regarded as a direct outgrowth of the consolidation, that the consolidation was not for this reason in any way detrimental to the shoe manufacturer, but, on the contrary, was for his benefit, since it enabled the United Company to offer him better terms, and enabled him to equip his factory cheaper than before. The argument of the United States upon the tying of department to department shows no reason for invoking the Sherman Act in behalf of the shoe manufacturer.

The effect upon other manufacturers of shoe machinery is a distinct topic to be considered later.

The leases are also complained of as restricting the shoe manufacturer's freedom of choice in taking the machines of other manufacturers, as preventing him from using the machines of others, and as compelling him to use the machinery of the defendants.

We may for the present disregard the fact that the United Shoe Machinery Company was organized by combining distinct companies.

The "exclusive use" clause relates only to machines of a particular kind or department, thus differing essentially from the prohibitive clause. It was in use before the consolidation, and after the consolidation was not changed in this respect. Though it does not relate to grouping what before was separate, this clause imposes a limitation upon the right to use machines of a particular kind. The legal effect of it is merely a reservation of a right to cancel the lease in case the lessee should fail or cease to use the defendants' machines exclusively for work of a particular kind. It does not have the legal effect of a contract by the lessee not to use the machines of others. It is merely a limitation imposed by a patentee upon the right to use.

The reiteration by the United States of the statement that the lessee must use, or is required to use, defendants' machines exclusively is misleading. The distinction between a contract requiring a lessee not to take other machines, and a limitation of the right to use the leased machines, is very material.

Brown, D. J., concurring.

The supplemental brief of the United States contends:

"There can be no defense under the patent laws as to any provision complained of in the leases, unless it be as to the use of the prohibitive clause."

But no distinction can be made in this respect between the exclusive-use clause and the prohibitive clause. Both are limitations imposed by a patentee upon the use of his invention. The exclusive-use clause is effective only when the lessee is operating machines of other manufacturers for doing work of a kind for which defendants' machines are available.

Here, again, the right of a patentee to so limit the license would seem to be directly sustained by the statement in *Henry* v. *Dick Co.*, 224 U. S. 1, 35, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, already referred to.

[400] The United States complains that it is the policy of the defendants to say to a lessee that for doing work of a particular kind he must use all or none of its machines.

If the general insistence upon the exclusive-use clause is evidence of refusal by the defendants to lease their machinery for use with the same kind of machinery taken from other manufacturers, yet this refusal precedes any contractual relation between the defendants and the licensees. At this time the parties are unquestionably free to contract or not to contract, and by refusing the terms offered the shoe manufacturer loses nothing which he had before. "The public is always free to take or refuse the patented article on the terms imposed." *Henry* v. *Dick Co.*, 224 U. S. 1, 32, Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

The United States replies that the shoe manufacturers are not free to take or refuse. "They have entered into contracts which constitute an endless chain with respect to the use of the United Company's machines."

It is in evidence that during the existence of the United Company many new factories have been established and new installations made for persons who have voluntarily accepted these terms. Can the shoe manufacturers be permitted to complain, or the United States upon their behalf to complain, of what has thus been agreed to? These agree-

Brown, D. J., concurring.

ments have been entered into voluntarily by parties assenting on terms of equality. Can it now be urged that the acceptance of a limited right shall be declared a sufficient ground for making the right unlimited? Being free to choose in the first instance, and having chosen, can a lessee now urge that he is not free to use the defendants' property as he pleases as a reason for dispensing with the necessity of procuring that right from the owner of the machinery which he has installed?

It is merely rhetorical to say that these contracts constitute an endless chain. We have seen that as to the prohibitive clause there is a mere question of price. As to the exclusive-use clause there is a mere question of choosing between two different sets of equipment for one operation. The recent decision of the Supreme Court in *Coppage* v. *Kansas*, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, January 25, 1915, should put an end in this case to any argument upon behalf of the shoe manufacturers which alleges compulsion or coercion, or which asserts a freedom to use the property of another without procuring from him the right to do so:

"For constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct."

We must keep this in mind: That it is no part of the policy of the Sherman Act to relieve men of full age from the obligation of their contracts, nor to interfere with contracts, except so far as they may restrain trade of contracting parties, or be aimed at the trade of third parties with a design to effect their exclusion from trade otherwise [401] than by supplying a demand in fair and lawful competition. It could not be said that the trade of the shoe manufacturer was restrained by the denial to him in the first instance of the use of patented machinery, whether arbitrarily or by offering terms he could not accept. It would be equally unsound to say that his trade is restrained by a contract which

provides for him at a very low price the most efficient machinery known at the time of the contract.

It is probably enough to say that, under the uniform rule recognized in many decisions, the defendants have the right, both as owners and as patentees, to refuse the use of the patented machines of any department as they may see fit, whether unreasonably or reasonably. However, as it seems to be contended that these rights have been impaired, to some extent, by the Sherman Act, we may consider whether or not the exclusive-use clause is inserted for reasonable and proper purposes.

It cannot be said that it is unreasonable or against public policy for the defendants to deal with shoe manufacturers only on the basis of a full equipment for a particular operation, when the subject matter of the contract is not machines alone, but patented inventions as well. The inventions may reasonably be regarded as the principal subject matter of the contract rather than the number of machines necessary to a particular manufacturer. While the manufacturer may prefer to contract with reference to each machine as a unit, the defendants may prefer to regard the number of machines with which a manufacturer is to be furnished as incidental merely to a policy of licensing those only who will pay royalty according to the amount of work they have for machinery embodying the patented inventions. The amount of royalties to be paid by the manufacturer is, of course, a primary consideration.

While in the early stages of the case there were some criticisms of any leasing system as opposed to a system of selling, the very great advantages to shoe manufacturers in general of being provided with machine equipment of the highest efficiency, and of being relieved of individual effort in that most costly and difficult part of manufacturing, and the general satisfaction with the system were so overwhelmingly proved that all doubt that the leasing system in general is unimpeachable has been removed. Furnishing capital to shoe manufacturers in the form of shoe machinery embodying costly inventions as well as great mechanical skill in manufacture, the defendants are fully entitled to claim a

proper share of the advantages resulting from what they have produced. How to obtain a just return for what they have contributed to the practical art has long been a problem with inventors. With many of them it has been a cause of complaint that a just share was denied them in what was attributable to their efforts. They have been accustomed, so far as they have been able, to reserve such rights as would secure to them a proper share in whatever business might be developed under the protection of patents covering their inventions.

In determining what is a reasonable share of profit when payment is to be made upon a royalty system, the value of the machinery as [402] a means of production must, of course, be considered. A contract that a lessee should pay in advance a gross sum computed upon the capacity of the machine, or a rental computed upon the capacity of the machine alone, could not be criticized as unreasonable. A royalty system, however, in which payment is made only according to use, is generally more acceptable.

If we are to consider such contract with regard to the rights of the lessor as well as to the rights and preferences of the lessee, it would be difficult to devise a more equitable arrangement than a requirement that the lessee should pay royalties according to the availability of the patented machinery for his use, rather than for such use of it as he may from time to time prefer to make. The lessor demands payment only so far as his machines are actually useful or available for the use of the lessee.

It is suggested in the brief of the United States that the lessor might accomplish all proper purposes by the fixing of a minimum amount of royalties; but such a suggestion does not solve the difficulty, for a minimum amount fixed in advance should include not only present use but such future use of the invention as might be developed. A royalty which has regard both to the capacity of the machines which the lessor furnishes and to the amount of work which the lessee may have to do upon machines embodying the patented inventions seems beyond reasonable criticism. It is of course essential not only to fix a royalty rate but to pro-

vide a rate of use and a period of time for the use. A contract of this character must have permanency, and may be reasonably continued over a long period of years. A royalty may be likened to interest upon a principal.

A contract involving so largely the subject matter of inventions and of patent rights, and relating to the use of tangible property of the defendants in the form of machinery and of intangible property in the form of patent rights, is substantially different from ordinary transactions of commerce, in that it relates so largely to the use merely of property, the title to which has not changed and which continues for a long period in a fixed location, out of the path of interstate commerce. *Browning* v. *Waycross*, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828. Where the annual use is small it would seem necessary that the period be protracted, in order to secure a fair return upon the investment. Where machinery is furnished which is of a capacity beyond the work which the lessee has to do, the efficiency of the machine in its great productivity, which is due to constant improvements, is not fully availed of; and it may be said that there is value lost owing to the limited business of such lessee. Where the product of a manufacturer is very large, and where the capacity of many machines is availed of, the manufacturer may think that the important thing is the gross amount which he is called upon to pay and that there should be some reduction in the rate of royalty or in the amount of use required. On the other hand, it might well seem to the Shoe Machinery Company that if its equipment had proved especially valuable to a particular business it should receive its full share on a pro rata basis.

There would seem to be little chance for a difference of opinion **[403]** upon the question whether a shoe manufacturer who had been furnished with machinery of greater capacity than he was able to avail himself of should diminish his return of royalties by the employment of the machinery of others. The presence and use of other machinery would in such case be so directly inconsistent with the reasonable requirement that he should pay royalties to the extent of the use for which the leased machine was avail-

Brown, D. J., concurring.

able, and use the machine to its full capacity so far as he had work for it, that the use of other than the leased machinery should be a sufficient cause for termination of the lease. It is said to be the case with a very large number—perhaps the majority in number—of shoe manufacturers that the machine equipment furnished them is more than sufficient for their work. The exclusive use clause, therefore, seems a necessary provision in these cases for securing what, from any point of view, must be regarded merely as reasonable compensation to the lessor.

With the large manufacturer the question is somewhat different. There will still exist the practical difficulty, if he introduces the machines of others, of determining what shoes are operated upon by such machinery and what by the defendants' machinery; but is there reason for denying to the defendants the right to invoke the exclusive use clause merely as a means of securing to themselves their royalty upon the entire work of that kind done by the manufacturer?

Here, undoubtedly, is a chance for a decided difference of opinion between the large manufacturer and the Shoe Machinery Company as to what part of the business success should be attributed to the defendants' patented machinery and what to the business ability of the shoe manufacturer, and for decided difference of opinion as to whether the claim of the Shoe Machinery Company to a royalty on all the work of a particular kind is reasonable. And here seems to be the only situation in which any question of the reasonable character of the exclusive use clause can arise. The terms, however, were fixed at the beginning, while both parties were free to contract or not. The machinery was installed with full notice that the lessee's right to its continued use was subject to the right of the Shoe Machinery Company to insist upon having royalties for all the work or to remove its machines if the lessee refused, as he has the right to do, to continue on that basis.

There is here no question of restraint of the trade of the shoe manufacturer, and no question whether a restraint of trade is reasonable or unreasonable. The lessee has con-

tracted away no right which, but for the contract, he might freely exercise. The defendants stand ready to supply the manufacturer with machinery for the profitable carrying on of his trade. The shoe manufacturer has a full right to choose, and if the exclusive use clause is invoked is free from all obligation under his lease.

Furthermore, a contract providing that a manufacturer's business be carried on with machinery entirely adequate for the conduct of his trade, and which is the best machinery known for the purpose, does not injuriously affect him or the public. The reasons which underly the rule of public policy that forbids contracts in restraint of trade are absent.

[404] A contract, requiring the use of certain machinery in a manufacturing business, between one who is to carry it on and one who is to furnish capital, or his own property, tangible or intangible, as a means for carrying it on, is a provision "for the prosecution of the business in a particular mode and not for its restraint." See *Kinsman* v. *Parkhurst*, 18 How. 289, 293, 15 L. Ed. 385; *Chicago, St. L. & N. O. R. Co.* v. *Pullman*, 139 U. S. 79, 89, 11 Sup. Ct. 490, 35 L. Ed. 97.

This cannot be treated as a petition for the reformation of contracts made between the defendants and the shoe manufacturers. An appeal to the public policy evidenced by the Anti-Trust Act cannot be made to extend the rights of the shoe manufacturers, under their contracts. There being no restraint of his trade, the United States shows no ground for intervention on behalf of the shoe manufacturer.

The "additional machinery clause," though not included in the Government's definition of a tying clause, requires a brief consideration.

This is a contract by the lessee that, if he has work for more machines than were first installed, he will take from the defendants such additional machinery of the same kind as is necessary for doing all his work of a particular kind. This was an old form of contract in use before the consolidation, and to some extent afterwards, though abandoned some time before the filing of the petition.

Brown, D. J., concurring.

The grounds upon which the exclusive use clause is held reasonable support this clause also. The exclusive use clause, however, represents the present policy of the company.

The "full capacity clause," by which the lessee agrees to use defendants' leased machinery to its full capacity so far as he has work for which it is capable of use, has already been referred to. The direct purpose of this is to secure a substantial amount of royalties. It is inconsistent with the use of the machines of others, but of this no just complaint can be made. Having a license for the use of patented inventions, the lessee must pay the agreed consideration, and if the licensor insists he must pay it whether he in fact uses the machinery or not.

The agreement to use to full capacity is auxiliary to the purpose of fixing the gross amount of royalties. It relates to machines with a recording mechanism which shows the number of shoes operated upon. Upon a breach of the agreement to use to full capacity it is difficult to see that there could be any basis for damages other than the amount of royalties that would have been paid had the machines been so used. An alleged breach of a somewhat similar provision for determining a quantity upon which royalty was to be paid was held not to be an independent cause of action, the provision being merely a subordinate part of an agreement to pay royalties. *Jobbins* v. *Kendall Mfg. Co.* (D. C.) 196 Fed. 216. See, also, *In re O'Gorman Co.* (D. C.) 195 Fed. 650.

But the general impracticability of determining the amount due, except in the way contemplated, fully justifies the provision for a cancellation of the lease upon a discontinuance of the use of the machine and the production of the proper record.

The United States concedes that if the "full capacity clause" stood [405] alone, thereby requiring the use of the leased machine alone as long as it could perform all work of that kind which the lessee had to do, it would be subject to little criticism. The objection is to its use in conjunction with the "exclusive use" or "additional machinery" clause. This conjunction of clauses, it is said, inserted in a large number of leases, shows a policy to force or create in the de-

fendants the power to force its lessees to use exclusively machines of that class. This it is asserted is unlawful.

But the mass of leases has in this respect no cumulative effect upon the shoe manufacturer, for each lease taken singly gives to the lessee notice that his right to use may be terminated if he fails or ceases to use exclusively. The question as to him is whether such a reservation of right made by the lessor of patented machinery is unlawful.

If there is any "force" exerted upon him, it is from his lease alone, and not from the mass of leases taken by others, and, as we have seen, is merely the result of a limited grant made by a patentee, who may refuse him any right of use. But here, as we have seen, is nothing that can justly be deemed coercion.

Complaint is also made in behalf of the shoe manufacturer that the term of the licenses is too long—17 years—and it is said that this period is regardless of the terms of the patents. Allegations were made that these long terms were fixed for the purpose of tying up by contract what would soon be free from control through letters patent. It is true that the United States referred to certain licenses which ran beyond the terms of any patents mentioned in them. The evidence shows, however, that the leased machines were, as matter of fact, protected by letters patent throughout the period of the leases. Seventeen years, of course, is the term of a patent. Nothing is more common in agreements concerning patented inventions than to contemplate and provide for improvements. The shoe manufacturers who have assented to this period cannot complain of it. They have secured very valuable rights at a very reasonable sum for a long period of years. The history of the company and the experience of the manufacturers, who have not been required to sink their capital in machinery which, as the evidence shows, will afford them no banking credit, shows no just cause for complaint as to the length of the contracts. The evidence shows that full value has been furnished by the defendants for the royalties which they have received.

In considering the reasonableness, as between the defendant company and the shoe manufacturer, of a long-term contract, we must look not alone to the fact that the shoe manufacturer may be bound for a long term. It is a case of reciprocal obligation, for the shoe manufacturer is bound for no longer period that that for which the defendants, upon a just construction of the lease contracts, are also bound. The requirement of use to full capacity, so far as the manufacturer has work, and the exclusive use or additional machinery clause, impose upon the defendants the corresponding duty to furnish machines, and the shoe manufacturer is relieved from his obligation unless the defendants supply him with the means for fulfilling it.

It has been suggested that the terms of these contracts may be in[406]definitely prolonged by furnishing additional machines only for new periods of seventeen years. Apparently there is no force in this suggestion; for a failure of the defendants to furnish what was necessary for carrying out the requirements of the contract, or the refusal to do so except on terms inconsistent with the original contract, would release the lessee from his obligation.

The insistence of the defendants upon the taking at the outset of an amount of machinery adequate for a lessee's entire work is, as we have said, unquestionably within their right. When additional machinery is sought, and the defendants insist upon the same general terms, their right to do so cannot be abridged by the fact that there has been a previous installation of machines. The policy is not altered from that of which the lessee was apprised at the outset.

The cancellation clauses, however, provide a practical means of escape for those who consider the term too long. They may install other machinery and run the chance, and if the machinery so installed is satisfactory they may use it for their full equipment when the machines of the defendants are removed.

It is contended for the defendants, and there is evidence in support of such contention, that the actual practice of the Shoe Machinery Company is not fairly represented by reference to the literal terms of the leases, but that it is much

more liberal, and that it is customary to make modifications in particular cases.

The general policy of the company has been clearly brought to the attention of its lessees and was exercised fairly and reasonably in those specific instances which the United States has brought to our attention.

It is stated upon the brief of the United States that the record shows that a number of the largest shoe manufacturers in the United States, lessees of defendants, are dissatisfied with their system of leasing. A number of these gentlemen have testified before us as to their very large production of shoes. They made no claim that the leases of which they complain have not furnished them with machinery entirely adequate for their business. Though the argument of the United States has urged upon us the unfortunate position of a shoe manufacturer after he has entered into contract with the Shoe Machinery Company, and deplores his supposed obligation to use the defendants' machinery throughout the contract period, yet these very intelligent gentlemen cannot be regarded as objects of unjust oppression or coercion unless that term be used in the very loose sense which was rejected by the Supreme Court in the case of *Coppage* v. *Kansas*, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, January 25, 1915.

The hardship to a manufacturer if, during this long period, there should come upon the market superior machinery has also been urged. During the period of the leases no such situation has apparently arisen. This argument was very sensibly dismissed in the *United Shoe Machinery Co.* v. *Brunet* [1909], A. C. 330, as based upon too remote a contingency. Such contingency was within the purview of the parties at the time they entered into the contract, and the choice of the restricted instead of the independent form of lease would seem to indi[**407**]cate that the practical value of being able to meet it was not considered by the shoe manufacturers greater than the amount of the initial premiums for independent machines. A business contract, like a statute, is not to be upset "upon hypothetical and unreal possibilities if it would be good upon the facts as they are." *Pullman* v. *Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. 441.

Brown, D. J., concurring.

As has been said, the Sherman Act was not designed to relieve parties from the obligation of contracts fairly entered into. It cannot be invoked in this case to abridge the right of contract in order to establish what Justice Holmes terms "the equality of position between the parties, in which the liberty of contract begins." *Coppage* v. *Kansas*, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 105. Here the parties stand upon terms of entire equality. The large shoe manufacturers and the defendants seem to differ as to what are fair and reasonable terms, but the Sherman Act cannot be invoked to settle a trade dispute of this character between such parties.

To justify interposition in behalf of the public it must appear that the interests are those of the public generally, as distinguished from those of a particular class. The legislature may not, in the guise of protecting the public interests, arbitrarily interfere with private business. *Lawton* v. *Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385. The rules of public policy which make a given contract void are not to be extended arbitrarily. *Baltimore & Ohio* v. *Voigt*, 176 U. S. 498, 505, 20 Sup. Ct. 385, 44 L. Ed. 560.

There remains to consider upon this branch of the case, and as directly bearing upon the reasonableness of these contracts, the important fact that a very large number of very intelligent and competent men, heads of manufacturing establishments, have independently accepted these terms. The large number of leases is strong evidence that upon the whole the terms are reasonable, and that the requirements from the lessee, of which complaint is made, have not been regarded as more than could be advantageously accepted. Such manufacturers have had free option to manufacture boots and shoes of other kinds. They may have from the defendants by purchase, if they like, the assistance of some 170 machines from their general department. They may have manufactured for them, if they see fit, those commercially practicable welters and stitchers upon which patents have expired, or they may manufacture largely by hand methods. It must be remembered that

the defendants' machines are largely labor-saving devices. The situation is not that of a monopoly, and the case of the United States upon that aspect has completely broken down. These contracts which the United States attacks, moreover, give to the lessees, many of whom seem entirely satisfied with them, very valuable rights. Nothing more impractical can be imagined than the prayer of the petition that these contracts should be canceled. To restore the parties to the original situation would probably result merely in agreements which would meet the objections of the United States, and would yet be in substance the same. Payment of royalties according to use necessarily involves some provision as to the amount of use. The exclusive use clause can only be criticized as requiring too much use, and therefore [408] too high a price. It is, after all, a question of price and the right of the defendants to fix their prices covers so many different modes that if this particular mode of payment is found objectionable, other modes less convenient, but accomplishing the same result, could readily be adopted.

The United States also objects to the fact that certain auxiliary machines for use in conjunction with the Goodyear welter and stitcher are supplied only to those who take the Goodyear welter and stitcher. These auxiliary machines are supplied without royalty, and for the purpose of increasing the production of the welter and stitcher; but there is no proof that the combination affected these. The right of a person to promote the sale or use of one class of goods by giving also other goods or tokens for goods, though it has been attacked by legislation, has been upheld in decisions which hold such legislation by a State unconstitutional. *Van Deman & Lewis* v. *Rast* (D. C.), 214 Fed. 827, 833; *Little* v. *Tanner* (D. C.), 208 Fed. 605, 610; *State* v. *Dalton*, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818.

The rule that a decree cannot be made which injuriously affects the rights of third parties would seem to require that before the court in any event could proceed to a decree to annul these leases the lessees should be before the court as parties. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 234,

235, 22 Sup. Ct. 308, 46 L. Ed. 499; *Shield* v. *Barrow*, 17 How. 130, 15 L. Ed. 158; *Gregory* v. *Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792.

THE EFFECT OF THE LEASES UPON OTHER MANUFACTURERS OF SHOE MACHINERY.

Here we have to consider the effect of the mass of defendants' leases upon persons who are not parties to them, and who, therefore, have not entered into any contracts in alleged restraint of their trade. The inquiry must be, therefore, whether, by reason of the insertion in a large number of leases of those clauses of which the United States complains, competition is suppressed to such extent as to tend to monopoly of interstate commerce in a field which otherwise would be open to competition.

It is most important to observe that the petition presented the leasing system as a part merely of a general plan of monopoly. The main brief of the United States so treated it.

The subject matter to which these leases relate is a part only of the machinery dealt in by defendants. The supposed field of monopoly has now shrunk so that it is much narrower than the general field of shoe machinery, or of shoe machinery for the bottoming of shoes by stitches or otherwise, in which field it appears that there never has been a monopoly, but always active competition between defendants' machines and other machines.

The supposed monopoly, or suppression of commerce, relates to machines for performing a part only of the large number of operations necessary to complete a shoe. The leases relate to machines protected by patents; many of them were originated and first put upon the market by the defendants. Many of these machines have such in[409]dividuality that there are no others which perform the same function, or with which they could be classed.

With articles of common production the existence of competitors may be assumed, but here no such assumption is admissible.

If the question here is whether the leases have the effect of unlawfully excluding competitors from interstate commerce

in shoe machinery, we must at the outset inquire in a general way as to the present or possible existence of competitors. In *United States* v. *Windsor*, it was said:

"The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents (Paper Bag Patent Case, 210 U. S. 405, 429 [28 Sup. Ct. 748, 52 L. Ed. 1122]), and it may be assumed that the success of the several groups was due to their patents having been the best."

As the subject matter of the leases is patented machinery, the presumption is that there are no competitors who can offer the same machinery. Whether there are competitors able to supply other kinds of machinery, patented or unpatented, which can be used for work of the same general description as that for which defendants' patented machines are adapted and used is matter of conjecture.

The competitor who is excluded from supplying the defendants' lessees, because the lessee is compelled to choose between his machines and the defendants' machines, may be, and as to many of the machines is likely to be, an imaginary being.

It appears, however, that for some of the operations for which the leased machines are adapted there are upon the market machines made by other manufacturers, and that in a general sense there are competitors.

To determine how far the leases have had the actual effect of excluding competitors, it would be necessary to consider in much detail the special subject matter of the leases, the dates of patents, and the special and peculiar operations performed by the machines.

The defendants insist that in order to meet a charge so much narrower than that of the petition it would be necessary for them to offer evidence as to each unit, and to prepare a defense of an entirely different character from that required to meet the petition; and this seems probable. We may, however, refer to a few considerations of a general character.

In the first place, we must make a clear distinction between that which undoubtedly the defendants have the right

to do and that which it is said may improperly affect competitors.

As owners of patented machinery and as manufacturers of machinery, whether patented or unpatented, they have the right to supply to the best of their ability as many customers as can be induced to take their machinery. They have the right, for the reasons which we have stated, to enter into long-term contracts with shoe manufacturers for the use of their patented machinery throughout the terms of the patents. Merely as manufacturers they have the right to enter into long-term contracts for supplying their machine equipment to those who are willing to agree to long-term contracts.

[410] That, irrespective of the question of patents, a long-term contract, 15 years, with exclusive rights, was not in general restraint of trade, and was not void as against public policy, was determined in *Chicago, etc., R. R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 89, et seq., 11 Sup. Ct. 490, 35 L. Ed. 97.

The United States relies greatly upon *United States* v. *Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, and seeks to establish an analogy between the so-called "65 per cent contracts" in that case and the large number of contracts of the defendants with shoe manufacturers in this case. But the resemblance between the Reading case and the present case lies only in the fact that in each is a large number of contracts. In the Reading case an existing and definite supply of coal was monopolized, and a definite part of that supply was monopolized through the 65 per cent contracts. In this case, so far as the leases are concerned, there is no question of monopolizing an existing supply. The monopoly, if any, is a monopoly of customers for machines for performing the particular operations to which the leases relate. The complaint is that defendants' customers are so bound by the leases that they are no longer customers for other manufacturers of shoe machinery.

The monopolizing of a definite and limited supply of a commodity and the monopolizing of customers for machines for performing certain operations in the manufacture of shoes

are as far apart as possible. The number of customers, or possible customers, for shoe machinery has been very largely increased during the life of the defendant company. Many of these customers were first induced to be customers for shoe machinery by the fact that machine equipments were offered them adequate for the establishment of a manufactory of shoes. The customers are not a fixed quantity. They comprise such persons out of the entire population of the United States as may be induced to engage in a manufacturing business by knowledge that they can procure adequate machinery for that purpose on suitable terms.

We must take into consideration not only natural persons but also those artificial persons easily created under general laws of incorporation for the conduct of any enterprise requiring a considerable amount of capital. A large number of shoe manufacturers concerning whom there is evidence in this case are corporations, and the leases relate to the activities of corporations. The individuals who are stockholders or officers of such corporations may in new corporate forms engage in shoe manufacture.

Upon the face of it any undertaking to monopolize such an undefined field as that of customers for shoe machinery seems impracticable.

Counsel for the United States inquire what possible hope there is for other manufacturers to deal with the customers of the Shoe Machinery Company, so long as their leasing contracts prevail. This inquiry would be substantially the same if all those provisions in the leases to which objection is made were stricken out.

Assume the existence of a large body of leases for only the period of patents and requiring merely payment for a right to use, but with the additional-machinery clause, the exclusive-use clause, and the prohibitive clause omitted; the inquiry would still be the same. It may [411] be said, however, that with these clauses in, it is somewhat more difficult to deal with a customer who has secured from defendants either a complete or partial equipment.

The exclusion from trade which results from the fact that many customers are supplied cannot be complained of by

Brown, D. J., concurring.

the United States. The complaint must be limited to such exclusion as results from the clauses objected to.

Perhaps the simplest way of treating the leases in this connection is to consider whether if the defendants had agreed in express terms to furnish for 17 years entire equipments for shoe factories, and the shoe manufacturers had agreed to operate these equipments exclusively for that period, this could be condemned.

The true effect of the leases is much less than this, but if such agreements can be condemned it must be upon the theory that both the defendants and the shoe manufacturers have lost the freedom of contract which existed before the Sherman Act, and that contracts advantageous to both, and agreed upon by both, are invalid because they take customers out of the market.

The Sherman Act seeks to maintain competition as a means to the end that trades may be made and closed, and not to forbid contracts in order that competition for particular customers may be perpetually maintained.

A public auction affords perhaps the fairest means for competition, but when the hammer falls the purpose for which the public auctioneer was employed is accomplished; competition has achieved its end—a binding contract.

If, between the parties, the contract is fair and has relation to the consideration which each is to render, if nothing which has no relation to this is inserted, the contract must be upheld, even though it may destroy a third person's chances for competition. We must find in the leases, or in the conduct of the defendants in offering them, or in enforcing them, something which "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it." *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48, 33 Sup. Ct. 9, 57 L. Ed. 107.

If, for the sake of the competing manufacturer of shoe machinery, it was sought to obviate the objection that the leases are too long, a reservation to the shoe manufacturer of a choice to terminate his lease at any time would seem to be all that could reasonably be asked. If allowed an op-

portunity to choose at any time between the machines he has taken and the machines of others, this should answer the objection to the length of the leases.

But the shoe manufacturer has such a choice.

The exclusive use and cancellation clauses serve to facilitate this choice and not to prevent it. If the defendants exercise their rights under these clauses he is freed completely, and thus becomes a possible customer for a competitor. If the defendants do not exercise their rights, he continues bound by his agreement for the payment of royalties; but, subject to this, he may, as we have seen, without actionable breach of contract, install at once the machinery of others.

[412] The contention of the United States that it is unlawful to make the shoe manufacturer, by the exclusive use clause, choose between the defendants' machines and other machines, we have seen cannot be sustained on behalf of the shoe manufacturer. Nor can it be sustained on behalf of the manufacturer of shoe machinery, for it opens to him a chance for competition. All cancellation clauses if exercised are in one way favorable to him. They are unfavorable only so far as the shoe manufacturer may desire to retain the machinery of the defendants.

In reality what stands in the way of a competitor is the desire of the shoe manufacturer to retain his rights under the leases. If compelled to choose he will choose the defendants' machinery, and thus the defendants, upon such choice, will win in competition.

It is quite true that when a shoe manufacturer has installed several machines under the prohibitive leases the extra cost of changing all his prohibitive leases for independent leases may be so considerable that competition is difficult. He has taken the machines as a group, and one who has not a group to offer in substitution has little practical chance to compete. But a competitor must be able to compete. If leases for machines for use as a group are offered and accepted for sound business reasons, and if, because of the greater productivity of a group and of the less cost of maintenance, better prices can be made, the defendants and the shoe manu-

facturers need not forego the making of such contracts for the sake of possible competitors who may have only single machines to offer. Contracts for large equipments of machinery, furniture, and other articles are too common to be condemned for such reason.

The United States treats the question of the leases rather as an abstract or verbal question than as a practical question, or a question of substance. The grouping of machines, each protected by one or more distinct patents, is treated as a mere artifice for making one machine sell another in a trade for machinery.

The assumption that it is highly desirable that the shoe manufacturer should be at liberty to group the defendants' machines with such other machines, taken from other manufacturers, as he may see fit, ignores the fact that, though machines may be treated in the Patent Office as separate, in a shoe factory the machines have a very definite mechanical relation to each other, and to the particular method of making a shoe. The grouping of machines in order that some may aid others in turning out a product affords a sufficient mechanical reason for installing them as groups, and a sufficient business reason for dealing with them as groups.

That there are sound mechanical and business reasons for grouping together machinery as it is grouped by a series of prohibitive leases is abundantly established. The United States fails to show that the grouping of the machines is in fact made merely as an unlawful artifice, and not because of sound mechanical and business reasons. It has referred to certain leases in which there appears to be no necessary mechanical relation between some of the machines grouped. Thus to a limited extent it may be true that the grouping is for the purpose of trade or of contract, rather than because of the close relation of the [463] machines in process of manufacture; but this is insufficient to show that the principal purpose was not, as is contended by the defendants, to secure by efficient coöperation of machines a larger production of shoes.

tract for a group of related machinery, or for a sep-
achines, not immediately related, but used only in
mechanical steps of a manufacturing business, is an

entirely proper and normal contract. The matter can not be better stated than by Judge Putnam in *United States* v. *Winslow* (D. C.), 195 Fed. 578, 592:

"It seems to be impossible to deny that the combination of various elements of machinery, all relating to the same art and the same school of manufactures, for the purpose of constructing economically and systematically, and of furnishing any customer, the whole or any part of an entire system, is in strict and normal compliance with modern trade progress; as also it might be in strict compliance with modern progress to limit the manufacture and supply to certain details, as, for example, steam gauges, wheels for railroad cars, or axles for steam locomotives, without furnishing anything else, although by so doing the manufacturer of details becomes able to command the entire market. It is absolutely normal, and in accordance with the rightful demand of the market, for any dealer to supply mere details or an entire system of machinery, according as his customers may desire."

It may be admitted that the inducements offered by the United Company in the complete or partial installation of a machine equipment on terms which relieve the manufacturer from the expense of an initial payment and from the loss by deterioration, make it a very formidable competitor. It may be assumed that the difficulty of introducing competing machines into factories so supplied is very great; but that this difficulty arises from the insertion of clauses in the leases which were directed at competitors, and were not inserted for the purpose of defining and securing a reasonable compensation to the defendants for the use of their patents and machinery, has not been made to appear.

The main purpose, to insure such permanency of the relation between lessor and lessees as has been agreed upon, being legitimate, and the judgment of a large number of practical men who have separately, and without concurrent action, accepted what was offered them by the United Company upon the terms offered, being the best proof of the reasonableness of these terms, we must hold that the difficulty of a competitor arises from the fact that customers are already supplied rather than from any provisions designed to hold these customers to what they have agreed to, or which provide for the termination of the leases and the freeing of the manufacturer from his contracts with the United Company.

Brown, D. J., concurring.

The free field in competition to which a new manufacturer of shoe machinery is at this date entitled is not a field where there is no prior art, nor where the shoe manufacturers are unsupplied with machinery, nor where there is an unsatisfied demand for machinery in every factory. One who goes into a field of manufacture already occupied must expect to find factories so fully equipped that they are no longer customers.

Counsel for the United States do not, however, sufficiently recognize the difference between the commercial situation relating to pat[414]ented articles and that relating to articles of general production. The inventor seeks to displace by invention inferior methods, and such displacement is encouraged by giving to the patentee a free field for his invention, and by giving him the right to offer it upon such terms as he may induce the public to accept. During the period of monopoly he may establish a good will which will give him after the expiration of his patents a formidable advantage in competition over imitative manufacturers. Frequently this good will and the development of his business may be such as to practically and lawfully exclude competition after the expiration of his patents. When a thing is so successfully accomplished and perfected as to satisfy all requirements, further invention in that field is often discouraged. The manufacture of complicated machines, in order to be profitable, must be on a large scale and by an organization having mechanical skill.

The defendants saw before them a large field for the business of supplying labor-saving machines to shoe manufacturers. They saw, as was expressed in a circular of the Goodyear Shoe Machinery Company, dated February 8, 1889:

"The great advantages to be secured by the control in one corporation, both in the United States and in foreign countries, of the most efficient types of shoe machinery."

This circular, instead of affording evidence of an improper purpose, shows a plan whose development has been of great advantage to the industry of shoemaking, and which has been determined to be lawful by the Supreme Court in *United States* v. *Winslow*, 227 U. S. 202, 217, 33 Sup. Ct. 253, 57 L. Ed. 481.

Brown, D. J., concurring.

It was but natural that a company dealing with shoe manufacturers, in respect to a device for labor saving upon one operation of shoe manufacture, should extend its business so as to be able to supply labor-saving devices for other distinct operations. As the operations in making a shoe are said to be 150, more or less, it was a natural development, after effecting a saving in one operation, to invent mechanical means for saving in other operations. Instead of closing the door to invention, invention in the art of shoe machinery was thus greatly developed and greatly encouraged.

A company of sufficient capital to furnish a large line of labor-saving devices for different operations in shoe making, which devices must necessarily be more or less related to each other, would properly strive to furnish not only single machines, but groups of machines, or an entire machine equipment. The enterprise of the defendants in developing and occupying a field in this way rendered it impossible, of course, for any subsequent organization to have the advantages of an unoccupied field. It is impossible to believe that the defendants' equipment is in so many shoe factories for any other substantial reason than the merits of what they have had to offer. To say that this is due, in any substantial degree, to the fact that its leases run beyond the terms of patents, or because of the exclusive use, prohibitive, or cancellation clauses, rests largely, if not entirely, upon assumption. But that the business of these defendants rests upon the lease provisions objected [415] to in such a substantial amount as to constitute any factor of independent force in securing or maintaining a monopoly does not appear.

The clauses objected to are all subordinate and auxiliary to maintaining rights, which unquestionably belong to the defendants, to charge their own prices and to choose as customers those who will pay those prices.

The attack of the United States is not upon these rights, but upon the particular mode in which they have sought to exercise them. Other modes, such as the requirement of arbitrary payment for the full period of the patents, would escape all such attacks. The attack arises from the attempt to adjust the payments to the amount of use which particular manufacturers may have for the patented inventions.

Syllabus.

The defendants very forcibly contend that no decree for the United States can be based upon the leases alone, as an independent ground for relief, for the reason that the leases were presented merely as parts of a general plan of monopoly. They in turn rely upon *United States* v. *Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; but to show that the petition cannot be sustained under the first section of the Anti-Trust Act, and insist also that the question whether the leases are contracts in restraint of trade cannot be determined because the lessees have not been joined as parties, and are not before the court.

They further insist that the subject-matter of the leases is substantially different from the subject-matter of the petition, and requires that the defendants be given an opportunity to introduce specific evidence as to the different patents and different machines.

The defendants during the trial have waived no rights in respect to these contentions.

In view of the fact that my conclusions upon the merits of the lease question are favorable to the defendants, I pass these objections without a decision upon their validity.

In view of the full discussion of the other portions of the case by my associates, I need only state my general concurrence in their conclusions, and that I concur in all respects in the opinion of Judge Dodge upon the lease question, as well as upon all other questions in the case.

UNITED STATES *v.* UNITED SHOE MACHINERY CO. ET AL.*

(District Court, E. D. Missouri, E. D. November 9, 1915.)

[227 Fed. Rep. 507.]

Monopolies 12—Clayton Anti-Trust Act—Monopolistic Leases.—Leases, by the maker of a very large percentage of all the shoe machinery made in the United States, of machines to shoe manufacturers, consisting of principal and auxiliary machines, the use

* For later opinion (234 Fed. 127) see *post*, page 791. See also (195 Fed. 578), *ante*, page 170; (222 Fed. 349) *ante*, page 686; (227 U. S. 202) *ante*, page 198.

of both kinds being necessary in the completion of a shoe, which leases contain provisions that the lessee shall not use the machine in the manufacture of footwear which has not had certain essential operations performed upon it by other machines leased from the lessor, that he shall use the leased machine exclusively for the class of work for which it is designed, that he shall obtain all duplicate parts and all supplies for the machine exclusively from the lessor at such prices as it may establish, and other similar provisions, and which further give the lessor the right to remove all leased machines in the event of the violation by the lessee of any term of any one of the leases, *held*, on motion for preliminary injunction, illegal, as in violation of Clayton Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 10—CLAYTON ANTI-TRUST ACT—CONSTRUCTION—APPLICATION TO EXISTING CONTRACTS.—Clayton Anti-Trust Act, § 3, which makes it unlawful to lease or sell machinery, etc., on any condition or agreement which will tend to prevent the lessee or purchaser from dealing with competitors of the lessor or seller, is applicable to a continuing contract of lease, although made before its passage.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. 10.]

In Equity. Suit by the United States against the United Shoe Machinery Company and others. On application for preliminary injunction. Granted.

Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., *C. J. Smyth* and *H. La Rue Brown*, Sp. Assts. Atty. Gen., for the United States.

C. A. Severance, of St. Paul, Minn., and *Chester H. Krum*, of St. Louis, Mo. (*Douglas Robert*, of St. Louis, Mo., and *Fish, Richardson, Herrick & Neave*, of Boston, Mass., on the brief), for defendants.

DYER, District Judge.

The plaintiff filed its bill of complaint against the defendants, and therein prays, among other things, that a preliminary injunction be granted restraining the defendants and each of them from directly or indirectly enforcing,

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[a] Syllabus copyrighted, 1916, by West Publishing Company.

Opinion of the Court.

threatening, or attempting to enforce certain clauses of the leases particularly referred to [508] in the bill. Upon the hearing of this application the court was favored by long and able arguments, to which it listened with attention and interest. The court was further favored by written arguments and briefs, to which it has also given consideration.

I recognize to the fullest extent, and heartily approve, the principles expressed in the opinion of the Supreme Court of the United States in *Truly* v. *Wanzer*, 5 How. 141, 12 L. Ed. 88, to wit:

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction."

In the light of that announcement, let us see what is now before the court.

[1] By an act of Congress approved October 15, 1914, commonly called or known as the "Clayton Act," it was provided, among other things, as follows:

"SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof, or the District of Columbia, or any insular possession, or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The bill in this case states: That nearly all of the shoes made in the United States are manufactured by machinery, 98 per cent of which machinery is made and controlled by these defendants. That over 1,500 manufacturers of shoes by machinery are engaged in business throughout the United States and make and put out annually 300,000,000 pairs of machine-made shoes, and that with all but a few of the manufacturers the defendants have business relations. The de-

fendants, it is averred, devote themselves particularly to the production of machinery used in preparing and attaching the soles to the uppers of shoes, but they do not manufacture machinery used in stitching together the uppers. Some of the machines made by the defendants are designated by them as "principal," while others are designated "auxiliary." The bill avers that important machines are put out by the defendants upon leases. On some of the machines the lessee is required to pay a royalty; on others, an annual rental. The "principal" machines cannot be operated profitably without the use of some, if not all, of the "auxiliary" machines, and the latter are of no practical value, except as they are used in connection with the "principal" machines. The bill further avers that the writings under which the defendants put out most of their machinery are designated "Order and temporary loan agreement," "Lease and license agreement," or "Agreement"; but each and all of them are referred to as leases. These leases run for a period of 17 years, and some of them were [509] made before and some after the passage of the act of October 15, 1914, commonly called the Clayton Act.

No complaint is made of the leases as a whole. Complaint is made only as to certain clauses therein. No relief is sought against the lessees. The clauses complained against are called in the bill "tying clauses." These clauses are Exhibits 1, 2, 3, 4, 5, 6, 7, and 8, and are as follows:

"(1) Shall not use the machine in the manufacture or preparation of footwear *which has not had certain essential operations performed upon it by other machines leased from the lessor.*

"(2) Shall use the leased machine to its fullest capacity.

"(3) Shall use *exclusively* the leased machine for the class of work for which it is designed.

"(4) Shall obtain from the lessor *exclusively*, at such price as *it* may establish, all duplicate parts and mechanisms needed in operating the leased machines and *all supplies* in connection with them.

"(5) Shall use patented insoles made on *defendants' machinery only* in connection with certain footwear manufactured by machinery leased from the lessor.

"(6) Shall lease from the lessor any additional machinery which he may need for work in the same department as that of the machine leased.

Opinion of the Court.

"(7) Shall permit the *lessor* to *determine* whether the lessee has in his factory more machinery adapted for doing the same work than he needs, and, if so, *to remove such machines as, in the opinion of the lessor*, are unnecessary.

"(8) Shall, at the *election of the lessor*, suffer a termination of all leases which he may have and the removal of all machines leased by him from the defendants, in the event of the violation of any term of any one of the leases."

The question then is: Are the clauses inserted in and forming parts of the contracts between the defendants and their lessees prohibited by the act of Congress heretofore referred to. Reading this act of Congress and the clauses complained of together, there can be but one conclusion, and that is that all of the clauses (with the possible exception of No. 2) complained of in the bill are clearly violative of the plain words of the statute.

If the court were in doubt as to the meaning of the act and of the intention of Congress in enacting it, that doubt would be readily removed by reading and considering the proceedings in both Houses of Congress touching the purpose of the law. In reference to section 3 of that act, the judiciary committee of the House made a report in which appears the following:

"Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Company, the American Tobacco Company, and the General Film Company, the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are engaged already, but from the opportunities to build up trade in any community where these great and powerful conditions are appearing under this system and practice. By this method and practice the Shoe Machinery Company has built up a monopoly that owns and controls the entire machinery now used by all great shoe manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. If the manufacturer, who is using machines of the Shoe Machinery Company, were to purchase and place a machine manufactured by an independent company in his establishment, the Shoe Machinery Company could, under its contracts, withdraw all of its machinery [510] from the establishment of the shoe manufacturer and thereby wreck the business of the manufacturer. * * * Again: If the transaction results in completely driving out competitive articles

from the community, as the contract by its terms takes them out of the business of the local dealer, there can be little room to question the contention of the advocates of this system that both the manufacturer and the dealer are benefited by the transaction. If, on the contrary, the local merchant who has tied his hands by an exclusive contract can not drive out of the community competitive articles, and thereby secure a monopoly of the trade in his immediate locality, it is manifest that he has been seriously hampered and injured in his business by the restrictions placed upon him by his contract. Again: What is the motive and purpose of the manufacturer in making or entering into such exclusive contracts? It is undoubtedly his purpose to drive out competition and to establish a monopoly in the sale of the commodities in that particular community or locality. His contract by its express terms completely shuts out competition in the business of the local dealer with whom he makes it. The dealer bound by this exclusive contract not to handle the goods, wares, and merchandise of another becomes an ally of the manufacturer in his efforts and purpose to drive out competition in the locality or community in which such commodities are sold."

There can be no question but that the act of Congress was aimed directly at the defendant the Shoe Machinery Company.

[2] It is insisted by counsel for defendants that the act can only apply to leases made after the act took effect. A satisfactory answer to this contention, I think, is made by the District Court of the United States for the Western District of Michigan in the case of *Elliott Machine Co.* v. *Albert M. Center*, 227 Fed. 124. In that case the court said:

"However, the principal question argued at the hearing of this motion to dismiss was that of the application and effect of the Clayton Act to and upon the contract between these parties which was made and entered into prior to the congressional enactment. In this discussion of the question counsel for both parties have assumed that the contract is single, and also that it is one which, if made at the present time, would fall within the ban of section 3 of the act. Counsel for defendant earnestly insist that, even if Congress so intended, the statute cannot be construed to apply to pre-existing contracts, and to prohibit their performance and enforcement, without violating fundamental and constitutional rights. The statute does not in terms except from its operation any agreements or contracts, past, present, or future, and in the absence of such exception it is to be presumed that Congress intended to prohibit, not only the making of future contracts, but also the further performance of past contracts of the kind specified. Congress derives its power to enact such legislation from the commerce clause of the Constitution, and the power so con-

Opinion of the Court.

ferred is broad, comprehensive, and all-embracing. All persons entering into contracts involving interstate commerce must do so subject to the right of Congress thereafter to control, regulate, and prohibit the performance thereof. 'Every owner of property holds the same subject to such action as the sovereign power of the State may, in the exercise of its legitimate sovereignty, adopt in relation to it.' It is now too well settled to admit of controversy that a contract to do a thing, lawful when made, may be avoided by subsequent legislation making it unlawful, and that an act of Congress may lawfully affect the rights which had their inception before its passage."

Counsel here contend that, if an injunction as prayed for in the bill be granted, irreparable damage will be done, not only to the defendants, but to each and every one of the hundreds of those manufacturers in the United States who are lessees of the defendants. Even if this be true, the court should not hesitate to declare the law, **[511]** whatever the result to the defendants and their lessees may be. If the course adopted and practiced by the defendants has had the effect to stifle competition and create a monopoly, then the law should be enforced, even if it resulted in going back to the awl and wooden peg. The continuing of the business as heretofore practiced by the defendants and its lessees might and probably would further enrich them, but this would be done at the expense of the men, women, and children who, by reason of the monopoly, are forced to buy shoes from such lessees and manufacturers. The high prices paid by manufacturers for the use of defendants' machines, "principal" and "auxiliary," fall eventually upon those who wear the shoes. It is in the interest of and for the benefit of those that the law was enacted. It is hard to see how the ingenuity of man could have devised a scheme that would more effectually create a monopoly than the scheme set forth in the bill in this case.

After fully considering the verified bill, and the affidavits filed in support thereof, as well as the affidavits presented and filed by the defendants in opposition, the court has reached the conclusion that the temporary injunction prayed for in the bill should be granted; and it is so ordered.

Syllabus.

UNITED STATES *v.* UNITED SHOE MACHINERY CO. ET AL.[a]

(District Court, E. D. Missouri. June 6, 1916.)

[234 Fed. Rep., 127.]

EQUITY 153—PLEADING 34 (1)—LIBERAL CONSTRUCTION OF PLEADINGS.—In modern practice, pleadings in civil actions at law or in equity are not construed with the strictness formerly applied to criminal indictments, but are to be taken to mean what their language fairly imports.[b]

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 386–389; Dec. Dig. 153; Pleading, Cent. Dig. §§ 66, 67, 71; Dec. Dig. 34(1).]

EQUITY 362—PLEADING—SUFFICIENCY OF BILL.—In the Federal courts of equity, indefiniteness of statement in a bill is not ground for a motion to dismiss, if, fairly construed, it states a cause of action; but the defendant has an adequate remedy under equity rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv) by motion for more particular statement.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758–761; Dec. Dig. 362.]

EQUITY 141(1)—PLEADING—PLEADING WRITTEN ISTRUMENTS.—Instruments of writing need not be set out in extenso in a bill, unless the bill shows that it is essential to the proper construction of the particular causes complained of, and which are set out.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 323–333; Dec. Dig. 141(1).]

MONOPOLIES 24(2)—SUIT UNDER CLAYTON ANTI-TRUST ACT—PARTIES.—To a suit by the United States to have leases of shoe machinery exacted by defendants from shoe manufacturers adjudged illegal, as in violation of Clayton Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, because of provision therein intended to prevent competition and to secure a monopoly by virtually compelling the lessees to purchase or lease other machines from defendants and preventing them from purchasing or using machines made by competitors of defendants, and to enjoin the further making or enforcement of leases containing such provisions, the lessees are not necessary parties; no relief being asked against them.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24(2).]

EQUITY 94—JURISDICTION OF FEDERAL COURTS—PARTIES.—The failure to join one who is a proper, but neither a necessary nor an indis-

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[a] For prior opinion (227 Fed. 507), see *ante*, page 784. See also (195 Fed. 578) *ante*, page 170; (222 Fed. 349) *ante*, page 686; (227 U. S. 202) *ante*, page 198.

[b]

Syllabus.

pensable, party does not deprive a Federal court of equity of jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 252; Dec. Dig. 94.]

CORPORATIONS 380—LIABILITY FOR CORPORATE ACTS—SUBSIDIARY CORPORATIONS.—Where one corporation owns all of the stock of another and controls its policy and business, it is responsible for the acts of the subsidiary corporation, which are considered in equity as its own acts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1540; Dec. Dig. 380.]

MONOPOLIES 24(2)—CLAYTON ANTI-TRUST ACT—SUIT FOR VIOLATION—PARTIES.—All of the stock of one corporation was owned by a second, and 98½ per cent of the stock of the second was owned by a third, and all three [128] had for the most part the same officers and directors. *Held*, that, in a suit by the United States for violation of the Clayton Act Oct. 15 1914, c. 323, 38 Stat. 730, by the first corporation, the other two corporations were properly joined as defendants.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24(2).]

CONSTITUTIONAL LAW 48—STATUTES—DETERMINATION OF VALIDITY—PRESUMPTION IN FAVOR OF VALIDITY.—A Federal statute will not be declared void by the courts, unless it appears beyond a reasonable doubt that it is not within the constitutional powers of Congress.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §46; Dec. Dig. 48; Statutes, Cent. Dig. § 56.]

COMMERCE 16—"INTERSTATE COMMERCE"—LEASING OF MACHINES.—The fact that every lease is not commerce is not conclusive that none may be, and where a large corporation, doing an interstate business amounting to millions of dollars annually in disposing of machinery which it manufactures, sees proper to lease instead of sell its machines, it is no less engaged in interstate commerce than it would be if it sold the machines, and its lease contracts are proper subjects of congressional regulation.

[Ed. Note.—For other cases, see Commerce, Cent Dig. § 2; Dec. Dig. 16.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

MONOPOLIES 10—CLAYTON ANTI-TRUST ACT—CONSTITUTIONALITY.—Clayton Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, making it unlawful for any person engaged in commerce, in the course of such commerce, to lease or sell goods, machinery, etc., on any condition, agreement, or understanding that the lessee or purchaser shall not use or deal in goods or machinery of a competitor of the lessor or seller,

where the effect may be to substantially lessen competition or tend to create a monopoly, as applied to leases made in the conduct of interstate business, is within the constitutional power of Congress.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. 10.]

STATUTES 216—CONSTRUCTION—EXTRINSIC AIDS.—It is only when an act of Congress is ambiguous that the debates when it is under consideration may be resorted to in aid of its construction; where the language is clear, it is controlling and conclusive.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 292; Dec. Dig. 216.]

MONOPOLIES 24(2)—SUIT FOR VIOLATION OF CLAYTON ACT—SUFFICIENCY OF BILL.—A bill alleging that the corporation defendants made leases of shoe machinery to manufacturers for use throughout the United States which contained provisions prohibiting the lessees from purchasing or using machines of other makers under penalty of increased rental, or of the cancellation of leases under which indispensable machines not otherwise obtainable were in use, *held* to state a cause of action for violation of Clayton Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, although it was not alleged that the lessees expressly bound themselves to observe such restrictions.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24(2).]

[129] MONOPOLIES 24(2)—SUIT FOR VIOLATION OF CLAYTON ACT—SUFFICIENCY OF BILL—Such a bill, if it charges the doing of acts by the defendants which are in terms made unlawful by the act, and that such acts tend to substantially lessen competition and to create a monopoly, is not insufficient because it does not allege that they were "unduly and improperly exercised."

[Ed Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24(2).]

CONSTITUTIONAL LAW 27—OBLIGATION OF CONTRACTS—POWERS OF CONGRESS.—The constitutional provision prohibiting the States from passing laws impairing the obligations of contracts is not a limitation upon the powers of Congress, to which it has no application.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 31; Dec. Dig. 27.]

In Equity. Suit by the United States against the United Shoe Machinery Company and others. On motion to dismiss. Denied.

See, also, 227 Fed. 507.

This is an action to enjoin the defendants, the United Shoe Machinery Company, a corporation existing under the laws of the State of Maine; the United Shoe Machinery Company, a corporation existing under the laws of the State of

Statement of the Case.

New Jersey; the United Shoe Machinery Corporation, also existing under the laws of the State of New Jersey, and certain individuals, alleged to be the directors and officers of these corporations, from enforcing, or attempting to enforce, certain provisions of leases alleged to be prohibited by section 3 of the act of Congress approved October 15, 1914, 38 Stat. 730, known as the "Clayton Act." For convenience the defendant United Shoe Machinery Company of Maine will be referred to in this opinion as the "Maine Company," the United Shoe Machinery Company of New Jersey as the "New Jersey Company," and the United Shoe Machinery Corporation as the "corporation."

The complaint is brief and concise, and will be practically set out in full. It charges: That the Maine Company is a corporation organized under the laws of the State of Maine, with an authorized capital stock of $3,000,000. Its original corporate name was "Goodyear Shoe Machinery Company." All of its capital stock, assets, and business were acquired in 1889 by the United Shoe Machinery Company of New Jersey, which now owns the same. That in 1902 the name of the "Goodyear Shoe Machinery Company" was changed to "United Shoe Machinery Company," and, while it continues its corporate existence, it is merely a selling and leasing department of the New Jersey Company. It is the only one of the defendants which does business in the Eastern district of Missouri. That the officers and directors of all three companies are in effect the same. That the New Jersey Company has a capital stock of $20,850,519, all of which is substantially owned by the defendant the United Shoe Machinery Corporation. That ever since its incorporation it has been engaged in manufacturing, selling, and leasing shoe machinery, and it is the operating company of the business followed by the defendants. Its chief manufacturing plant is at Beverly, Mass., and its officers and directors are, for the most part, the same as those of the other corporate defendants. That the corporation has an authorized capital stock of $50,000,000, and is empowered by its charter to engage in manufacturing, selling, and leasing shoe machinery, but its activities have been confined chiefly to those of a holding com-

pany. Shortly after its organization it acquired and now owns 98½ per cent of the outstanding capital stock of the New Jersey Company and through this company dominates the other corporate defendants. In addition, it controls the stock of certain other affiliated corporations engaged in business related to the shoe machinery interest. That the defendant Sidney M. Winslow is president, director, and [130] managing officer of all these three corporations, and numerous other corporations owned and subsidiary corporate defendants, and the other individual defendants are officers and directors, some of all three corporations, and others of two of the defendant corporations. That the defendants have leased, sold, and are leasing and selling their machinery, supplies, and repairs, and in certain instances have fixed and are fixing the prices thereof, and discounts and rebates from such prices, on condition, agreement, and understanding that the lessee or purchaser shall not use the machinery, supplies, or other commodities of competitors of the lessors, which agreements tend to create a monopoly in that branch of interstate commerce which relates to the shoe machinery business.

The bill then alleges: That nearly all shoes now made in the United States are manufactured by machinery. Over 1,500 manufacturers are engaged in cities and towns of nearly every State of the Union in the production, annually, of more than 300,000,000 pairs of machine-made shoes. With all but a very few of these manufacturers the defendants have business relations. That the defendants devote themselves particularly to the production of machinery used in preparing and stitching soles to the uppers of shoes. They also manufacture machinery used in other shoemaking operations. That the defendants divide certain of their important machines into two clasess, "principal" and "auxiliary." In a general way machines which perform operations of major importance are spoken of as "principal" while machines which execute operations necessary to the work of "principal" machines are called "auxiliary." The distinction, however, it is charged, is largely arbitrary, and results chiefly from the defendants' system of leasing. Many of the more important machines are put out by the defend-

ants on leases. On some the lessees are required to pay royalties, and on others an annual rental. All machines on which royalties are exacted are designated as "principal," and all those on which an annual rental is paid "auxiliary."

The cutting of the soles, uppers, and lining, and the stitching of the uppers and lining, follow about the same course with respect to all kinds of shoes. It is when the sole comes to be attached to the upper of the shoe—"bottomed," as it is called in the trade—that the fundamental difference in construction arises. Here two chief categories appear: In the one the soles are fastened by thread; the other, by wire, nails, or wooden pegs. The first category is sub-divided into three classes: (A) McKay sewed; (B) turned; (C) welt shoes. The second category is divided into two classes: (a) Metallic fastened; (b) pegged shoes. The McKay sewed shoe is so called because it is bottomed on a McKay sewing machine; the turned shoe takes its name from the fact that it is turned inside out during the process of attaching the sole, which is done on a welt and turn sewing machine; the welt shoe is so designated because a narrow strip of leather, called a welt, is sewed to the upper and insole, by a welt sewing machine, and the outsole is attached to the welt by an outsole stitching machine. Metallic fastened shoes have their soles attached to the insoles on a "loose nailer," or by wire screws on a "standard screw" machine; pegged soles are bottomed on a "pegging" machine. In connection with the working of these machines are certain accessory operations which are executed for the most part by "auxiliary" machines. The bill then describes how this work is done. It is then charged that "principal" machines cannot be operated profitably without the use of some, if not all, of the "auxiliary" machines. The "auxiliary" machines are of substantially no value, except as they are used in connection with the "principal" machines.

The illegal actions of which complaint is made are described as follows: The writings under which the defendants put out most of their machinery are variously designated "ordinary and temporary lease and agreement," "lease and agreement," "lease and license agreement," or "agree-

ment," but are in the bill referred to as leases. Under these leases it is charged the defendants ship, and for many years have been shipping, in interstate and foreign commerce, the shoe machinery and supplies herein referred to, from Beverly, Mass., to points in other States and foreign countries. The leases generally run for a period of 17 years. Many of them were made before, and some since, the passage of the Clayton Act, but all are now being enforced by the [131] defendants. The bill does not complain of the leases as a whole, but only parts thereof, which are described in the bill as "tying clauses" and "discounts and rebates." The bill charges that in each of the leases there are certain provisions denominated the "tying clauses," because they tie together the uses of several leased machines, and in effect, though not always in terms, prohibit the lessees from using machines of lessor's competitors. For example, the fastening machines may not be used on any shoe not welted, stitched, slugged, heeled, or seat-nailed on machinery leased from the defendants. In other words, machines are "tied" in a similar manner. The tying clauses provide in substance that the lessee: (1) Shall not use machinery in the manufacture or preparation of footwear which has not had certain essential operations performed upon it by other machines leased from the lessor. (2) Shall use the leased machinery to its full capacity. (3) Shall use exclusively the leased machinery for the class of work for which it is designed. (4) Shall obtain from the lessor exclusively, at such prices as it may establish, all duplicate parts, mechanisms, or repairs needed in operating the leased machines, and all supplies needed in connection with them. (5) Shall use patented insoles made on defendant's machinery only in connection with certain footwear manufactured by machinery leased from the lessor. (6) Shall lease from the lessor any additional machinery which he may need for work in the same department as that of the machine leased. (7) Shall permit the lessor to determine whether the lessee has in his factory more machinery adapted for doing the same work than he needs, and, if so, to remove such machines as, in the opinion of the lessor, are unnecessary. (8) Shall, at the election of the lessor, suffer

Statement of the Case.

a termination of all leases which he may have, and the removal of all machines leased by him from the defendants, in the event of any violation of any term of any one of the leases.

Copies of the clauses above referred to are attached to the bill as Exhibits 1, 2, 3, 4, 5, 6, 7, and 8.

EXHIBIT 1.

The leased machinery shall be used for no other purpose than for lasting boots, shoes, or other footwear made by or for the lessee. The leased machinery shall not, nor shall any part thereof, be used in the manufacture or preparation of any welted boots, shoes, or other footwear, or portions thereof, which have been or shall be welted in whole or in part, or the soles in whole or in part stitched, by the aid of any welt-sewing or sole-stitching machinery not held by the lessee under lease from the lessor, or in the manufacture or preparation of any turned boots, shoes, or other footwear or portions thereof the soles of which have been or shall be in whole or in part attached to their uppers by the aid of any turn-sewing machinery not held by the lessee under lease from the lessor, or in the manufacture of any boots, shoes, or other footwear which have or shall be in whole or in part pulled over, slugged, heel seat-nailed, or otherwise partly made by the aid of any pulling-over or "metallic" machinery not held by the lessee under lease from the lessor.

EXHIBIT 2.

Subject to the foregoing limitations, the lessee shall use the leased machinery to its full capacity upon all boots, shoes, or other footwear, or portions thereof, made by or for the lessee in the manufacture or preparation of which such machinery is capable of being used.

EXHIBIT 3.

If at any time the lessee shall fail or cease to use exclusively lasting machinery held by him under lease from the lessor for lasting boots, shoes, and other footwear made by him or for him, which are lasted by the aid of machinery, or shall fail or cease to use exclusively tacking mechanisms and appliances held by him under lease from the lessor for doing all work in the manufacture of all boots, shoes, and other footwear made by or for him which is done by the aid of tacking mechanisms and appliances, the lessor, although it may have waived or ignored prior instances of such failure or cessation, may, at its option, terminate forthwith, by notice in writing, any or all leases or licenses of lasting machines, lasting machinery,

Statement of the Case.

lasting mechanisms, or lasting devices then existing between the lessor and the lessee, whether as the result of assignment to the lessor or otherwise; and the possession of and full right to and control of all lasting machines, lasting machinery, and lasting mechanisms shall thereupon revest in the lessor free from all claims and demands whatsoever.

[132] EXHIBIT 4.

The lessee shall obtain from the lessor exclusively, and shall pay therefor at the regular prices from time to time established by the lessor, all the duplicate parts, extras, mechanisms, and devices of every kind needed or used in operating, repairing, or renewing the leased machinery, and the same shall form part of the leased machinery, and the lessee shall not otherwise make or allow to be made any addition, subtraction, or alteration to, from, or in the leased machinery without the consent in writing of the lessor, nor interfere with the proper operation of the same. The lessee shall also purchase from the lessor exclusively, at the prices from time to time established by the lessor, all supplies, including string nail, tack strips, and other fastening materials used in connection with the lasting machinery.

EXHIBIT 5.

The leased machinery shall be used only in the manufacture or preparation of reinforced insoles which embody the inventions patented in letters patent of the United States of America, No. 849,245, dated April 2, 1907, owned by the lessor, for use in welted boots, shoes, and other footwear known in the trade as "Goodyear welts," which have been or are to be welted wholly by Goodyear welt and turn shoe machines or Goodyear inseam sewing machines held by the lessee under lease from the lessor, and the soles of which have been or are to be attached to their welts wholly by Goodyear outsole rapid lockstitch machines held by the lessee under lease from the lessor, or for use as insoles or soles of turned boots, shoes, and other footwear known in the trade "Goodyear turns," the soles of which have been or are to be attached to their uppers by Goodyear welt and turn shoe machines of Goodyear Universal inseam sewing machines held by the lessee under lease from the lessor, and in the manufacture or preparation of such patented insoles (or soles) the lessee shall use the principal machinery hereby leased to its full capacity so far as the lessee uses reinforced insoles (or soles) in the manufacture of such footwear. The auxiliary machinery hereby leased shall be used only in the manufacture or preparation of said patented insoles (or soles) which have been or are to be reinforced wholly by an Economy insole reinforcing machine hereby leased or held by the lessee under other leases and license from the lessor.

Statement of the Case.

6. The lessee is hereby licensed under letters patent of the United States, No. 849,245, dated April 2, 1907, to manufacture by the use of the principal machinery hereby leased during the continuance in force of this lease and license the patented insoles covered by said letters patent and to use such patented insoles so made by the lessee in the manufacture of welted or turned boots, shoes, or other footwear which have been or are to be manufactured as provided in article 5 hereof.

EXHIBIT 6.

In case the lessee has more work of the kind which can be performed by any of the machines belonging to the metallic department of the lessor than the capacity of the metallic machinery which he has under lease from the lessor will permit, then the lessee shall either take from the lessor, under a like lease and agreement, sufficient and additional machinery to perform the work, or in case the lessee does not thus lease additional metallic machinery from the lessor, then the lessor may, if it so elects, cancel forthwith this lease and any other lease of metallic machinery then in force between the lessor and the lessee, whether as the result of assignment or otherwise.

EXHIBIT 7.

12. In case the lessee, at any time, shall have in his factory more machines adapted for doing the same work as any machine or machines hereby leased than in the opinion of the lessor are sufficient for performing the work which the lessee has in his factory, based upon the capacity of such machines and the number and kind of boots, shoes and other footwear made by the lessee for any period of twelve (12) consecutive months next preceding, the lessor may, at its option, upon thirty (30) days' notice in writing to the lessee, terminate the lease and license herein contained and in respect to such of the said machines as in the opinion of the lessor are unnecessary.

EXHIBIT 8.

This lease and license shall continue, unless sooner terminated by the lessor as herein provided for seventeen years from the date hereof. But if any breach or default shall be made in the observance of any one or more of the conditions contained herein or contained in any other lease or license agreement existing between the lessor and the lessee, whether as the result of assignment to the lessor or otherwise and expressed to be obligatory upon the lessee, the lessor shall have the right by notice in writing to the lessee to terminate forthwith any and all leases of or licenses to use machinery then in force between the lessor and the lessee, whether as the result of

Statement of the Case.

assignment to **[133]** the lessor, or otherwise, and this notwithstanding that previous breaches or defaults may have been unnoticed, waived, or condoned by or on behalf of the lessor.

The bill then charges that competitors of defendants have produced, sold, and leased, and are now producing, selling, and leasing, in interstate commerce, machines similar in function to many important machines put out by the defendants and affected by the "tying clauses" herein described. Exhibit 13 to the complaint is a list showing the different machines used in the manufacture of shoes showing, in one column, how many of these different machines are put out to shoe manufacturers in the United States by the defendants, and in another column by all other shoe machinery manufacturers in the United States.

EXHIBIT 13.

Machines put out to shoe manufacturers in the United States.

	By defendants.	By all others.
Clicking machine	3,655	None
Eyeletting machine	4,472	150
Pulling-over machine	(a)	(a)
Lasting machine	7,496	7
Standard screw machine	(a)	(a)
Pegging machine	(a)	(a)
Tacking machine	3,488	6
McKay sewing machine	898	8
Welt sewing machine	2,527	142
Outsole stitching machine	2,676	758
Loose-nailing machine	1,835	24
Heeling machine	2,019	17
Slugging machine	1,876	23

[a] No competition in the United States.

In nearly all cases where shoe manufacturers have used or are using any machines procured from competitors of the defendants, the latter have threatened and do now threaten to remove from the factories of the said manufacturers, all machines leased from them. In some cases the defendants have removed the machines, and in other instances have imposed heavy penalties upon manufacturers because of the use of such machines, secured from defendants' competitors in violation of said "tying clauses." That some of these competitors of the defendants are prepared to supply certain machines of the kinds referred to, as well

Statement of the Case.

as other machines adapted to the making of shoes, at prices much less and on terms more favorable than those exacted by the defendants for similar machines, and shoe manufacturers desire to procure them but are deterred from doing so by the "tying clauses" and from fear of the severe financial consequences that would follow their violation. Besides, competitors of the defendants, other than those now in existence, would arise and other shoe-making machines would be manufactured and put out by them if the field of competition was free from the restraining effect of said "tying clauses."

Some indispensable machines can be obtained only from the defendants, for example, the stitch indenter and burnisher. In the lease under which the defendants put out these machines they tie their use to other machines which they manufacture, and thereby compel the lessees to procure all such other machines from the defendants, the effect of which is practically to prohibit the shoe manufacturers from obtaining any such other machines from competitors of the defendants. That some leases put out by the defendants have clauses which provide for a discount or rebate on prices fixed for the use of the machines rented—in certain contingencies eliminating the price entirely—in consideration of the lessees using other machines of the defendants. Copies of these clauses are filed as Exhibits 9, 10, 11, and 12.

EXHIBIT 9.

6. The lessee shall pay to the lessor throughout the full term of this agreement the respective amounts set forth in the following schedule in respect to each pair of welted [134] boots, shoes, or other footwear, or portions thereof, manufactured or prepared by or for the lessees, which shall have been welted in whole or in part or the soles of which shall have been in whole or in part attached to welts by the use of any welting or stitching or sewing machinery, and in respect to each pair of "turned" boots, shoes, or other footwear, or portions thereof, manufactured or prepared by or for the lessee, the soles of which shall have been sewed or attached to their uppers in whole or in part by the use of any sewing or stitching machinery, viz.:

Statement of the Case.

Schedule of payments per pair.

	Sizes, form Nos. —.	Welts.	Turns.
		Cents.	*Cents.*
Children's	1 to 10½, inclusive	3	1
Misses'	11 to 2, inclusive	4	1¼
Women's	2½ and over	6	1½
Boys'	9 to 13, inclusive	4	1¼
Youths'	1 to 5, inclusive	6	1½
Men's	5½ and over	8	1½

All payments and the guaranty in this agreement provided for are independent of and in addition to all payments and guaranties provided for in any other leases or licenses or agreements between the lessor and the lessee: Provided, however, that (excepting in so far as is required by the guaranty herein contained or contained in other lease and license agreements between the lessor and the lessee), in case under any other "Goodyear department" lease and license agreement between the lessor and the lessee covering one or more Goodyear welt and turn shoe machines, Goodyear Universal inseam sewing machines, or Goodyear outsole rapid lock-stitch machines, the lessees shall have paid to the lessor the amount set forth in the schedule of payments in such lease and license agreement contained in respect to any pair of boots, shoes, or other footwear, then the lessee shall be relieved from said payment hereunder in respect to that pair of boots, shoes, or other footwear.

EXHIBIT 10.

ORDER AND TEMPORARY LOAN AGREEMENT, NO. 236 "A."

8. The licensee, until such time as he shall have redelivered all of said machinery to the United Company, as hereinafter provided, shall pay to the United Company the sum of one-half of one cent (½¢) in respect to each and every pair of boots, shoes, or other footwear, or portions thereof, manufactured and prepared in said factory or in any factory to which any of the said machinery shall be removed which have been pulled over in any way, whether wholly or in part, by the aid of machinery, whether or not of the United Company; and the licensee shall also pay to the United Company in respect to each pair of boots, shoes, or other footwear, or portions thereof, in the manufacture or preparation of which any machine hereby leased is used, the sum of one-quarter of one cent (¼¢) for each machine so used; Provided, however, that the total of the payments required to be made under this article hereof or under the corresponding article of any other pulling-over department lease or license agreement or agreements heretofore executed between the lessee and the United Company shall not exceed such amount as shall make the total of such payments for such factory and of the payments for such fac-

Statement of the Case.

tory required to be made under the corresponding article of any lease or license agreement or agreements between the licensee and the United Company covering lasting machines equal to a payment in respect to the total number of pairs of footwear made in whole or in part in such factory at the following rates, viz:

In respect to all footwear lasted by machines held by the licensee under lease or license agreement from the United Company an amount for each pair three-fourths (¾) of one cent in excess of the amount required to be paid under the terms of the lease or license agreements covering such lasting machines.

In respect to all footwear not lasted by machines held by the licensee under lease or license agreement from the United Company one and three-fourths (1¾) cents for each pair of children's (sizes 1 to 10½ inclusive) or misses' (sizes 11 to 2 inclusive) footwear and two (2) cents for each pair of all other kinds, excepting alone that turned footwear in the manufacture of which no lasting machine shall be used shall in such computation be included at the rate of three-fourths (¾) of one cent per pair only.

EXHIBIT 11.

9. The licensee shall pay to the United Company, in accordance with the following "Schedule of payments," in respect to each pair of footwear made in said factory or in any factory to which any of the said machinery shall be removed, in the manu[135]facture of which any one or more of the operations which can be performed by the machines of the metallic department of the United Company or any of them is performed by machinery, whether performed by machinery of the United Company or by other machines, viz:

Schedule of payments.

	Per pair. Cents.
For each pair of turned footwear in which no metallic fastening machine is used for attaching sole	½
For each pair of welted or slip soled or McKay sewed footwear in which no metallic fastening machine is used for attaching either a welt, slip sole, or outsole	1
For each pair of footwear the outsoles of which are attached by metallic fastenings	3
For each pair of footwear of all other kinds	2

excepting, however, that in the case of each pair of footwear in which all such metallic operations as are performed by machinery in the manufacture thereof are performed by metallic department machinery of the United Company, held by the licensee under lease or license agreement from the United Company, and in which all of the metallic materials inserted by such machinery are obtained from the United Company at the prices from time to time established by the United

Company (which prices include not only the price for the materials themselves, but also an additional amount as royalty for the use of the machines by which the same are inserted), such payment in accordance with the foregoing "Schedule of payments" shall not be required to be made.

[The words "United Company" appearing in the above exhibits refer to one of the corporate defendants.]

EXHIBIT 12.

Four. The lessee, as rent and royalty for the leased machinery, shall purchase exclusively of the lessor all the fastening material used by him in connection with the leased machinery, and shall pay the lessor in cash on delivery the regular and uniform prices therefor, as established from time to time by the lessor, which shall not be more than ten (10) per cent in excess of the prices to be established from time to time by the lessor for like fastening material to be used in its metallic-department machinery by lessees who shall agree not to use the metallic-department machinery leased to them in the manufacture of boots and shoes which are lasted on machines other than those leased from the lessor, or of welted boots, or shoes which are not welted and stitched on welt sewing and sole stitching machines leased from the lessor, or turned shoes the soles of which are not attached by turn sewing machines leased from the lessor.

Some of the machines are leased by the defendants on what they call an "unrestricted" form of lease. Under that form the lessee in certain cases is permitted to use with the machine leased from the defendants machinery obtained from the competitors of the defendants. These "unrestricted" leases involve the payment of certain "initial premiums" which have remained the same for many years. These "initial premiums" are in addition to the royalties and other charges, which are the same as under the "restricted" form of lease. The amounts of these "initial premiums" are so large as to practically prohibit the choice of the "unrestricted" form. It is charged that these premiums would amount to about $250,000 upon the machinery in a factory having an output of 25,000 to 30,000 pairs of shoes daily.

The bill then sets out how the defendants obtained control of the shoe machinery business, by charging that the New Jersey Company, soon after its organization, acquired and still owns the capital stock of the Goodyear Machinery Company, Goodyear Machinery Company of Canada, the International Goodyear Machinery Company, Consolidated &

McKay Lasting Machine Company, McKay Shoe Machinery Company, and Eppler Welt Machine Company, all of which companies were, at the time they were so acquired, engaged in the business of manufacturing, selling, and leasing, and otherwise dealing in shoe machinery; that these companies conveyed to the New Jersey Company all of their business, including letters patent of the United States and all other countries. Afterwards from time to time this corporation secured and still maintains control of 56 other concerns engaged in the manufacture, sale, and leasing of some form of shoe machinery, or supplies, thereby controlling a complete line of "principal" and "auxiliary" machinery used in the bottoming of shoes. Before then no one company could supply such a line, nor can any company do so now outside the defendants. By reason of this **[136]** control the defendants make the unlawful lease clauses set out in the complaint, whereby shoe manufacturers are prohibited from using in the bottoming of shoes machinery or supplies of defendants' competitors, and to this cause is due the fact that the defendants control, as they do, 98½ per cent of the shoe machinery business of the United States, as shown by Exhibit 13.

The prayer of the bill is that the clauses of the leases hereinbefore referred to, and all clauses of like tenor and effect, and the conditions, agreements, and understandings upon which the leases were made, as aforementioned, be declared illegal and void under the said Clayton Act, and that the defendants be enjoined from enforcing or attempting to enforce the same and from making any similar clauses or leases upon like conditions, agreements, or understandings in the future.

The defendants have filed motions to dismiss the complaint, assigning 20 causes. As many of these are mere repetitions, and as the grounds relied on by the defendants will be referred to in the opinion, it is unnecessary to set them out in this statement of facts.

Constantine J. Smyth and *H. La Rue Brown*, Sp. Asst. Attys. Gen., for the United States.

Charles F. Choate, jr., of Boston, Mass., *Chester H. Krum*, of St. Louis, Mo., *Cordenio A. Severance*, of St. Paul, Minn., and *Frederick P. Fish*, of Boston, Mass., for defendants.

TRIEBER, District Judge (after stating the facts as above):

Section 3 of the Clayton Act, which was invoked as the basis for this action, is as follows:

"SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

We will first dispose of those grounds of the motion which affect the pleadings only.

[1] It is claimed that the allegations in the complaint are not specific enough to enable the court to determine whether the acts charged are within the meaning of the statute, nor sufficient to enable the defendants to prepare their defense.

Counsel in their arguments, as well as in their briefs, stated their position as follows:

"In any pleading, whether criminal, at law, or in equity, the thing charged should be stated with such precision and certainty that the defendant may know with what he is charged, that he may prepare his defense, and so that the court may be able to determine whether the offense charged is within the provisions of the statute."

While this rule is applied to indictments in criminal proceedings, the rule in civil actions, either at law or in equity, is much more liberal. Mr. Justice Holmes, delivering the opinion of the court in *Swift* [137] *& Co.* v. *United States*, 196 U. S. 375, 395, 25 Sup. Ct. 276, 279 (49 L. Ed. 518), which was an action under the Sherman Anti-Trust Act, held:

Opinion of the Court.

"Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed 100 years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of the English speech."

Nor does the old rule that "every intendment is against the pleader, and therefore the pleadings must be strictly construed against him," govern the courts at this day; but, on the contrary, the courts now recognize the fact that it is of more importance to determine issues than pleadings, provided, of course, the facts alleged in the complaint entitle the plaintiff to the relief sought.

[2] The new equity rules, which in effect are similar to the Code procedure prevailing in most of the States, are clearly intended to simplify pleadings and do away with many of the technicalities theretofore required. That under the Codes a demurrer upon mere technical grounds would not lie, but that the proper remedy is a motion to make the complaint more specific, is now well settled. 4 Standard Enc. of Procedure, 859; Bliss on Code Pleading (3d ed.) § 425A; *McAllister* v. *Kuhn*, 96 U. S. 87, 24 L. Ed. 615; *United States* v. *Parker*, 120 U. S. 89, 94, 7 Sup. Ct. 454, 30 L. Ed. 601; *Singers-Biggers* v. *Young*, 166 Fed. 82, 91 C. C. A. 510; *Locker* v. *American Tobacco Co.* (D. C.) 194 Fed. 232; *Phillips* v. *Jones*, 79 Ark. 100, 104, 95 S. W. 164, 9 Ann. Cas. 131; *Sanders* v. *Carpenter*, 102 Ark. 187, 190, 143 S. W. 1091. Equity rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv) offers the defendants an adequate remedy, if the allegations in the complaint are not specific enough to enable them to prepare their defense.

Even under the old rule general certainty only was required in pleadings in equity. *St. Louis* v. *Knapp Co.*, 104 U. S. 658, 661, 26 L. Ed. 883. Only when the uncertainty in the pleadings is of such a nature that it does not state a cause of action will a demurrer, or, under the present equity rules, a motion to dismiss, lie. The complaint does not lack that certainty which is necessary to enable the court to determine whether it states a cause of action; nor can it be said that the allegations are too uncertain to enable the defendants to prepare their defense.

It sets out as fully as is necessary for a proper defense what the plaintiff expects to rely on, and therefore enables the defendants to prepare their defense. To a similar objection made in *Swift & Co.* v. *United States*, *supra*, which, as stated before, was an action under the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209), Mr. Justice Holmes replied:

"This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous [138] and shifting, even the constituent parts alleged are and from their nature must be so extensive in time and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it, notwithstanding these difficulties."

The complaint in this case is drawn in concise terms and, without repetitions and unnecessary verbiage, states the facts which the pleader claims show that the plaintiff is entitled to relief under the Clayton Act. The failure to set out the leases in full only tends to reduce the size of the record, as the complaint expressly alleges that only the parts set out in the exhibits are contrary to the statute, and only as to them is relief sought. If other provisions of the leases would show that these excerpts are misleading, that the lease as a whole would show a different state of facts than is alleged in the complaint, they may be set out in full in the answer, as counsel during the argument admitted that they had the original leases in their possession; or, if they believe that with the entire leases before the court it would appear that they are not subject to the construction put upon the clauses set forth in the complaint, and that they do not violate any statute of the United States, a motion under equity rule 20 would give them all the relief needed. This rule is a copy of the English chancery rule (Order XIX, rule 7), and as stated in *Spedding* v. *Fitzpatrick*, 38 C. D. 413:

"The bill of particulars is to enable the party asking for them to know what case he has to meet at the trial, and to save unnecessary expense and avoid allowing parties to be taken by surprise."

Opinion of the Court.

[3] In the opinion of the court instruments of writing need not be set out in extenso in the pleadings, unless the bill shows that it is essential to a proper construction of the particular clauses complained of. Such is not the case here.

[4] *Is the petition defective for failing to make the lessees defendants?*

The leading authority upon which the defense relies to sustain this ground of their motion is *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499. But the facts in that case differ so materially from those set out in the plaintiff's bill that it is wholly inapplicable to the instant case. In that case the State of Minnesota brought suit to enjoin the Northern Securities Company from exercising any control in the management or operation of two separate railways, existing under the laws of the State of Minnesota, which it was charged it attempted to do by reason of the ownership and control of the majority of the stock of the two railways and numerous other roads controlled by these railways, by virtue of stock ownership, and in violation of the laws of the State of Minnesota. Mr. Justice Shiras, delivering the opinion of the court, stated the object of the bill to be:

> "The narrative of the bill unquestionably disclosed that the parties to be affected by the decision of the controversy are, directly, the State of Minnesota, the Great Northern Railway Company, the Northern Pacific Railway Company, corporations of that State, and the Northern Securities Company, a corporation of the State of New Jersey, and, indirectly, the stockholders and bondholders of these corporations, and the numerous railway companies whose lines are alleged to be owned, managed, and controlled by the Great Northern [189] and Northern Pacific Railway Companies. * * * But it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company."

Some of the relief prayed in the bill was that the Northern Securities Company and its officers be enjoined "from in any way aiding, advising, directing, interfering with, or in any way taking part, directly or indirectly, in any man-

ner whatsoever, in the management, control, or operation of any of the lines of railway of either of said companies, * * * and from doing any and all acts and making any arrangements or combinations, by contract or otherwise, having for their object, effect, or result, the consolidation or establishment of a joint management or control in any manner whatsoever of the said Great Northern and Northern Pacific Railway Companies, their lines of railway or properties." No such relief is asked in this case, nor does the complaint seek the cancellation of any leases made by the defendants, but only to enjoin the enforcement of those clauses in the leases which it is charged are prohibited by section 3 of the Clayton Act.

Shields v. *Barrow*, 58 U. S. (17 How.), 130, 15 L. Ed. 158, another case relied on by defendants, is wholly inapplicable to the facts in this case, as that was an action for the rescission of a compromise, and it was held that all the parties who, by the compromise sought to be rescinded, had been released of liability, were indispensable parties, as the object of the bill was to restore the plaintiff to his original rights as they existed before the compromise, and therefore would place upon these absent parties a liability of which they had been released by the compromise. It is hardly necessary to say, as it clearly appears from the language of the act, that the object of the statute invoked by the plaintiff was for the protection of the lessees and indirectly the public; Congress evidently presuming that the lessees accepted these leases under duress, and it is so charged in the complaint. It alleges:

"In the leases under which the defendants put out these machines they tie their use to other machines, which they manufacture, and thereby compel the lessees to procure all such other machines from the defendants, the effect of which is practically to prohibit the shoe manufacturers from obtaining any such other machines from competitors of the defendants."

And again:

"Competitors of the defendants have produced, sold, and leased, and are now producing, selling, and leasing, in interstate commerce machines similar in function to many of the important machines put out by the defendants and affected by the 'tying clauses' herein de-

Opinion of the Court.

scribed. In nearly all cases where shoe manufacturers have used or are using lasting machines procured from competitors of the defendants, the latter have threatened, and do now threaten, to remove from the factories of said manufacturers, all machines leased from them. In some instances the defendants have removed such machines, and in other instances have imposed heavy penalties upon shoe manufacturers because of the use of such machines procured from the defendants' competitors in violation of said 'tying clauses.'"

[140] [5] Aside from these allegations, it is expressly stated in the bill that no relief is sought against the lessees. What relief could the Government ask against them? They are alleged to be bound hand and foot by these clauses in the leases, and must either submit to them or do without those machines, which are under the absolute and sole control of the defendants, and, if compelled to do without them, go out of business. Even if the lessees were proper parties, which is doubtful, the jurisdiction of the court would not be ousted for a failure to join them, as only indispensable parties, and in some instances necessary parties, must be joined. *Cella* v. *Brown* (C. C.), 136 Fed. 439; affirmed id., 144 Fed. 742, 75 C. C. A. 608; *O'Neil* v. *Wolcott Mining Co.*, 174 Fed. 527, 536, 98 C. C. A. 309, 318, 27 L. R. A. (N. S.) 200; *Silver King, etc., Mines Co.* v. *Silver King C. M. Co.*, 204 Fed. 166, 122 C. C. A. 402; *Lion Tractor Co.* v. *Bull Tractor Co.*, 231 Fed. 156, 145 C. C. A. 344, opinion filed February 12, 1916.

An indispensable party has been defined as:

"When he has such an interest in the subject-matter of the controversy that a final decree cannot be rendered in the suit without injuriously affecting the absent party, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." *Rogers* v. *Penobscot Mining Co.*, 154 Fed. 606, 83 C. C. A. 380, and authorities there cited.

A necessary party is:

One who has "an interest in the controversy, and who ought to be made a party, in order that the court may act on that rule, which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it." *Shields* v. *Barrow*, *supra*.

No title to nor possession of property is involved in this case. Still, if any of the lessees believe that their interests

may be injuriously affected by this action, they can apply to the court to be made parties, and the court will then determine whether leave to do so should be granted. So far none of the lessees has asked to be made a party. *United States* v. *Du Pont de Nemours & Co.* (C. C.), 188 Fed. 127. In the court's opinion the lessees are not indispensable nor necessary parties to this action, as the relief prayed in the bill, if granted, can in no wise affect them or their rights, except that it may relieve them of an onerous, and, as the complaint alleges, illegal, burden. *Vetterlein* v. *Barnes*, 124 U. S. 169, 8 Sup. Ct. 441, 31 L. Ed. 400.

[6, 7] *Are the New Jersey Company and the New Jersey Corporation improperly joined as defendants?*

It is urged that, as the Maine Company is the only defendant alleged to have made the leases complained of within the jurisdiction of this court, the other corporate defendants, each of whom has filed a separate motion to dismiss, are not proper parties. The allegations in the bill are that the entire capital stock of the Maine Company is owned by the New Jersey Company, and that the New Jersey Corporation owns 98½ per cent of the capital stock of the New Jersey Company; that the officers and directors of the three corporations are practically the same, all of them serving as such officers and directors in at least two of the corporations, and some in all three. But it is claimed that **[141]** as each corporation is an entity, and as there is no charge of conspiracy, the mere fact that they are the owners of the capital stock of the Maine Company, the only offender, does not justify their being made parties defendants.

Whatever may have been the views of the courts in the early days of corporate existence, when there were but few corporations, and they mostly confined to business of a quasi public nature, at this date courts, and especially courts of equity, will look behind the corporate fiction, and if it clearly appears that one corporation is merely a creature of another, the latter holding all the stock of the former, thereby controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation,

Opinion of the Court.

when necessary for the purpose of doing justice. In *McCaskill* v. *United States*, 216 U. S. 504, 514, 30 Sup. Ct. 386, 391 (54 L. Ed. 590), Mr. Justice McKenna, delivering the opinion of the court, said:

"Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge the counter presumption that in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations. §§ 663, 664, 727. The principle was enforced in this court in *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417 [12 Sup. Ct. 239, 35 L. Ed. 1063]."

The same rule was recognized in *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 274, 35 Sup. Ct. 440, 59 L. Ed. 725. In *Miller & Lux* v. *East Side Canal Co.*, 221 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189, it was held that a plea that the plaintiff Miller & Lux, who instituted the action in a national court of the State of California, claiming to be a Nevada corporation, was organized under the laws of Nevada to act as the agent of Miller & Lux, a California corporation; that the California corporation owned all the capital stock of the Nevada corporation; that all the property of the Nevada corporation was held as agent for the California corporation, and that it had no other existence; that it was incorporated with the sole object to enable it to maintain suits in the national courts of California by reason of a diversity of citizenship; that it transacted no business except such as was necessary to carry out the performances of the California corporation; that therefore the Circuit Court should not retain jurisdiction of the cause, there being, in fact, no diversity of citizenship, both parties being citizens of the State of California—was rightly sustained by the Circuit Court, and its judgment affirmed by the Supreme

Court. In *Northern Securities Co.* v. *United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, Mr. Justice Harlan said:

"Necessarily by their combination or arrangement (referring to the Securities Company as holder of a majority of the shares of the constituent companies), the holding company in the fullest sense dominates the situation in [142] the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines, for the exclusive benefit of its stockholders."

In the same case, when pending in the Circuit Court (120 Fed. 721, 725, 726), Judge Thayer, delivering the opinion of the court, in which Circuit Judges Caldwell and Sanborn concurred, said:

"It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of a majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. * * * The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 671 [16 Sup. Ct. 705, 40 L. Ed. 838]," and numerous other cases cited in the opinion.

Referring to *Pullman Car Co.* v. *Missouri Pacific Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499, another case relied on by counsel for defendants, the same learned judge distinguished it by saying:

"In that case the meaning of the word 'controlled,' as used in a private contract, was the point under consideration, and what was said on the subject cannot be held applicable to cases arising under the Anti-Trust Act, when the point involved is whether the ownership of all of the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership."

In *Chicago Mill & Lumber Co.* v. *Boatmen's Bank*, 234 Fed. 41, — C. C. A. —, opinion filed April 27, 1916,

Opinion of the Court.

Judge Adams, speaking for the Circuit Court of Appeals of this circuit, said:

"It is true that, apart from the question of ultra vires, not presently involved, when one corporation owns and controls the entire property of another and operates its plant and conducts its business as a department of its own business, or as its alter ego, it is responsible for its obligations," citing a number of authorities.

In re *Rieger* (D. C.), 157 Fed. 609, the court said:

"The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it and preserve the rights of innocent parties or to circumvent fraud."

In *United States* v. *Milwaukee Refrigerator Transit Co.* (C. C.), 142 Fed. 247, it was charged that the defendant was a dummy corporation, organized, owned, and operated by the stockholders of a brewing company, as a device to cover rebates on interstate shipments of beer, and the court held:

"A corporation, from one point of view, may be considered an entity without regard to its shareholders, yet the fact remains self-evident that it is not in reality a person or thing distinct from its consistent parts. The word 'corporation' is but a collective name for the members who compose the association [citing authorities]. If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; [143] but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Of the many other cases to the same effect, see *State ex rel.* v. *Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *First National Bank* v. *F. C. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834.

From the allegations in the complaint it is beyond question that the Maine Company is merely a subsidiary of the New Jersey Company, and that both are under the absolute control, by reason of its stock ownership, of the New Jersey Corporation. The acts of one are the acts of all these corporations; in fact, it may truthfully be said that they are the acts of the United Shoe Machinery Corporation. This being the case, they are properly joined as defendants.

Opinion of the Court.

[8–10] *Is section 3 of the Clayton Act, so far as it applies to leases, unconstitutional?*

Counsel for defendants challenge the constitutionality of so much of section 3 of the Clayton Act as applies to leases. It has been earnestly and ably argued that a lease is no more commerce than insurance or manufacturing, and it is claimed, if not commerce, it cannot be interstate commerce. The diligence of the able counsel has not been rewarded by finding any authority which has determined that question, nor has the court been able to find any. In the argument many extreme illustrations were made. It is a well-settled rule that courts are slow to declare the acts of coördinate departments of the Government void, and unless it appears beyond a reasonable doubt that the act is violative of the fundamental law of the United States the courts will uphold it. As stated by Mr. Justice Holmes in *Interstate, etc., Railway Co.* v. *Massachusetts*, 207 U. S. 79, 128 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555:

"It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of a real doubt a law must be sustained."

This principle of law was settled at an early date by Chief Justice Marshall in *Fletcher* v. *Peck*, 10 U. S. (6 Cranch) 87, 3 L. Ed. 162. The fact that the question has never been before the courts or that the power has never been exercised by Congress, is no proof that the Constitution does not authorize it. As stated by Mr. Justice Brewer In re *Debs*, 158 U. S. 564, 591, 15 Sup. Ct. 900, 909 (39 L. Ed. 1092):

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

Opinion of the Court.

It may be conceded that every lease is not commerce, but that is not conclusive that none may be. Each case must be determined from [144] the peculiar facts shown to exist in that case. When a corporation with millions of capital, doing an annual business amounting to millions of dollars, sees proper to conduct its business by only leasing its chattels instead of selling them, why is it not as much engaged in commerce as if it sold them outright? But, aside from that, cannot a person be engaged in interstate commerce although, if its business is confined exclusively to its own State, it would not be engaged in commerce?

The act of Congress of June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1913, §§ 8812–8819), commonly known as the "White Slave Act," makes it an offense to transport, or cause to be transported, in interstate or foreign commerce, any woman or girl for the purpose of prostitution or for other immoral purposes. In *Hoke* v. *United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, arising under that act, it was contended that the immoralities of their citizens can only be controlled by the States, and as women are not articles of commerce, there can be no reason for holding that, by reason of transporting them from one State to another, or furnishing means for such transportation, the acts can become interstate commerce. But the court unanimously held that, while it is true that women are not articles of commerce, if transportation is employed as a facility for their wrongs, Congress has the power to regulate or prohibit such acts under the commerce clause.

Acquiring an education would not ordinarily be commerce, but in *International Text-Book Co.* v. *Pigg*, 217 U. S. 91, 106, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, it was held that, as contracts between the company and its patrons involved the transportation from one State to another of books, apparatus, and papers, useful or necessary in the particular course of study the scholar is pursuing, the company was engaged in interstate commerce.

In *Butler Bros. Shoe Co.* v. *United States Rubber Co.*, 156 Fed. 1 to 17, 84 C. C. A. 167, 183, the issue involved was

whether a contract of factorage, under which the Rubber Company consigned to the Shoe Company goods from an Eastern State to Colorado, to be sold by the Shoe Company as a factor. Judge Sanborn, after a very thorough review of the authorities bearing on that subject, held:

"Nor is the fact that these contracts did not evidence sales of the goods determinative of this question. A sale is not the test of interstate commerce. All sales of sound articles of commerce, which necessitate the transportation of the goods sold from one State to another, are interstate commerce; but all interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

From this it appears that every negotiation or dealing between citizens of different States which causes such importation is a transaction of interstate commerce. In *Marienelli* v. *United Booking Offices* (D. C.) 227 Fed. 165, it was held that booking performers for a theatrical circuit, which requires them to pass from State to State, taking **[145]** with them paraphernalia and stage properties, constitutes interstate commerce.

It is not necessary to cite the many authorities found in the books sustaining this conclusion, as they will be found collated in the opinions hereinbefore cited. It is sufficient to say that as new methods of transacting business are devised, if they are found to be in effect methods of carrying on commerce in any business, and the means for commercial transactions between the owner of the article on the one hand, and the person who wants to deal in it or use it in carrying on his business on the other hand, whether it be manufacturing, selling, trading, leasing, transportation, communication, or information, and it is sent or transported from one State to another, it is interstate commerce, and therefore, subject to be regulated by Congress under the commerce clause of the Constitution.

The bill charges that the machinery manufactured by the defendants is leased for the purpose of enabling the lessees to manufacture shoes; that they deal with over 1,500 shoe manufacturers in all parts of the United States, and, when

the leases are made, the machinery is shipped by the defendants from the State of Massachusetts, the place of manufacture, to other States of the Union and to foreign countries. Upon these facts there can be no other conclusion than that the defendants are engaged in interstate commerce, and subject to be regulated by Congress. Whether it applies to leases made and sold in the same State and not transported to another State, it is unnecessary to determine on this motion, as bill charges shipments to other States. By reference to the act under consideration it will be noticed that, while section 1 defines the word "commerce" as used in the act, section 3 prohibits any person engaged in such commerce from doing the acts prescribed and enumerates them. The act is not limited to leases, and sales in interstate commerce, as is the Employers' Liability act of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665); but the language employed is like that used in the amendment of March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. 1913, §§ 8613–8615), to the Safety Appliances Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1913, §§ 8605–8612]). This amendment had, prior to the enactment of the Clayton Act, been held to embrace all locomotives, cars, and vehicles used on a railway that is engaged in interstate commerce, and is not confined exclusively to vehicles engaged in interstate commerce. *Southern Railway Co.* v. *United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, reaffirmed at the present term of the Supreme Court in *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874. But whether this act should be so construed and held to apply to the intrastate business as well as the interstate business of the defendants, in view of the fact that the defendants are charged to be engaged in interstate commerce, need not be determined now, as the question may never arise. Reference is made to it only for the reason that during the oral argument counsel for defendants stated that a very large part of the defendants' business is intrastate.

[146] [11] *Do the allegations in the complaint show a violation of section 3 of the Clayton Act?*

The act declares unlawful any lease, etc., where the price is fixed, or a discount or rebate upon such price is granted,

under the condition, agreement, or understanding that the lessee or purchaser thereof is not to use or deal in the goods, etc., of a competitor of the lessor, or seller, where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding, may be to substantially lessen competition, or tend to create a monopoly in any line of commerce. For the purpose of aiding in the construction of the act, counsel in their argument have read copious extracts from the reports and debates in Congress, while the act was under consideration. They have also furnished the court with copies of these reports and debates, and they have been carefully read; but so far as the construction of the act is concerned the court does not feel justified to consider them. It is only when the language of a statute is ambiguous that these sources can be referred to. If the language is clear and free from ambiguity, there is nothing for the courts to construe. *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 23 L. Ed. 224; *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Dunlap* v. *United States*, 173 U. S. 65, 19 Sup. Ct. 319, 43 L. Ed. 616; *Maxwell* v. *Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; *Dewey* v. *United States*, 178 U. S. 510, 20 Sup. Ct. 981, 44 L. Ed. 1170; *MacKenzie* v. *Hare*, 239 U. S. 299, 307, 36 Sup. Ct. 106, 60 L. Ed. 297.

Aside from this, the record of the proceedings of the two Houses of Congress shows that section 3 of the Clayton Act, as finally enacted, differs materially from the section as passed by each House. The words "where the effect of such lease, sale, contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition, or tend to create a monopoly in any line of commerce," are not found in either of the acts as passed by the House of Representatives or the Senate. Nor does the act as finally passed make the violation of that section a penal offense, although each of the houses had made such a provision. The act as finally passed was the result of the conference committees appointed by the two Houses. What induced the conferees to make the changes, and Congress to adopt them in the final enactment of the statute, is un-

Opinion of the Court.

known. Whether the speeches made, while the bill was pending, influenced the conference committees, and, if so, to what extent, is merely speculative, and for the courts to consider them in construing the act, as finally passed, might be misleading.

[12] A careful reading of this section of the act leaves no room for doubt as to what Congress intended. The language is plain, and the court is unable to find any ambiguity in it which would make it necessary to resort, for aid in its construction, to any source outside the act itself. In plain and concise language it declares that it shall be unlawful for any person engaged in interstate commerce to lease, sell, or contract for sale of any commodity, whether patented or not, for use, consumption, or resale, and fix a price for, a discount from, or rebate up[147]on such price, on the condition, agreement, or understanding, that the lessees shall not purchase such articles from the competitors of the lessor or the seller, and then is added:

"If the effect of such an agreement, or understanding, may be to lessen competition, or tend to create a monopody."

That the leases made by the defendants, as shown by the extracts attached to the complaint as exhibits, provide for rebates on condition that the lessee shall only use the machines and materials manufactured and dealt in by the defendants, and forbids the use of machines purchased from other manufacturers, under penalty of having the leases canceled and machines taken from them by defendants, is beyond question. But it is claimed that there is nothing in the leases whereby the lessees covenant or bind themselves not to use any machines manufactured by other parties, or purchase materials which are dealt in by the defendants, from others. This is true, but as the lessors retained the right, in case any other machines are used in the manufacture of shoes than those manufactured by the defendants, of canceling the leases and removing the leased machines, and further provide for a rebate to those who comply with these terms, which those using other machines or material do not receive, there is an implied promise on the part of the lessees not to violate these conditions of

the leases, or suffer the penalties set out in the leases. It is charged in the bill:

"In nearly all cases, however, they [lessees] are deterred from doing so by the said 'tying clauses,' and by fear of the serious financial consequences that would follow their violation. * * * Some indispensable machines can be obtained only from the defendants; for example, the stitch indenter and burnisher."

Exhibit 5 shows that the machine therein mentioned is protected by letters patent of the United States and provides that:

"The lessee is hereby licensed under Letters Patent of the United States No. 849,245, dated April 2, 1907, to manufacture by the use of the principal machinery hereby leased, during the continuance in force of this lease and license, the patented insoles covered by said letters patent, and to use such patented insoles so made by the lessee in the manufacture of welted or turned boots, shoes, or other footwear, which have been or are being manufactured as provided in article 5 hereof."

The acceptance of a deed poll containing a provision that the grantee assumes payment of a certain mortgage or lien on the premises conveyed binds the grantee to the performance of the terms, and an action, in some States at law, while in others in equity, will lie on the implied promise. *Keller* v. *Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Willard* v. *Wood*, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531; *Fiske* v. *Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Locke* v. *Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Johnson* v. *Muzzy*, 45 Vt. 419, 12 Am. Rep. 214; *Patton* v. *Adkins*, 42 Ark. 197; *Dismukes* v. *Halpern*, 47 Ark. 317, 1 S. W. 554; *Hand* v. *Kennedy*, 83 N. Y. 149; *Bowen* v. *Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Finley* v. *Simpson*, 22 N. J. Law, 311, 53 Am. Dec. 252; *Crowell* v. *St. Barnabas Hospital*, 27 N. J. Eq. 650; *Maule* v. *Weaver*, 7 Pa. 329. The right to impose a [148] heavy penalty for doing certain things is just as effective to prevent them as a covenant not to do them.

It is therefore unnecessary that the lessees should bind themselves to these conditions or agreements by covenants. It is sufficient that the natural and inevitable effect of the leases, accepted by them, leads to the same result as if they

had in express terms bound themselves not to use any other machines or materials than those manufactured or dealt in by the defendants. But, to remove any doubt upon the subject, Congress, out of abundant caution, added the words "or understanding" after the words "contracts or agreements." The word "understanding," as defined by lexicographers, includes mental discernment, comprehension, clear knowledge. Professor March, in his valuable Thesaurus Dictionary, defines it as equivalent to "comprehension."

Counsel contend that "understanding" is equivalent to "agreement," except that it imports that it is oral. The court cannot adopt this definition. In its opinion it means something more. It means an implied agreement, resulting from the expressed terms of the agreement, whether written or oral, or where the law from certain acts of the parties implies an agreement to do a certain act. A right to recover on a quantum meruit is based upon an understanding or implied agreement to pay for services rendered for one's benefit, although there is no express agreement to pay therefor.

Can there be any doubt that these clauses in the leases are understood by the lessees to mean that by using no other machines than those of the defendants they are relieved of certain royalties, otherwise exacted for the use of the defendants' machines? See Exhibits 9, 10, 11, and 12. And can there be any doubt but that, if the lessees use the defendants' lasting machines for shoes welted on machines made by other manufacturers, or fail to use exclusively defendants' machines for lasting shoes, or fail to purchase from the defendants exclusively all duplicate parts, extras, and devices of every kind, needed or used in operating, repairing, or renewing the lasting machinery, or fail to use exclusively the auxiliary machinery of the lessor in the manufacture or preparation of insoles licensed under letters patent No. 849,-245, or fail to buy any additional machines needed in their shoe factory, which can be leased from the lessor, that under the terms of the leases set out in the Exhibits 1, 3, 4, 5, and 6, all of the leases can be canceled and the lessees be deprived of the use of them and be compelled to pay certain royalties

which otherwise they would not have to pay? Exhibit 9 expressly authorizes the lessor to terminate all leases for these breaches, although the lessee is bound by them for 17 years from the date of the lease, whether the patents, if there be any, have expired or are still in force.

Can it be doubted that these provisions are not only within the spirit but the letter of the statute? What is the natural, direct, and necessary effect of these conditions? There can be but one answer to this: To compel the lessees to use defendants' machinery and material, regardless of whether the terms granted by the defendants are as favor[**149**]able as can be obtained from other manufacturers of some of the machines or dealers in some of the materials.

In addition, it is charged that by reason of these leases there is no market for any one inclined to manufacture these or some of these machines, and therefore all are deterred from engaging in their manufacture, as, there being no market for them, financial failure is bound to result from the attempt. Such a condition of affairs clearly tends to substantially lessen competition, and create, in favor of the defendants, a monopoly in that line of commerce.

In addition, it is charged in the bill that the New Jersey Company acquired and still owns the capital stock of 56 other concerns, at one time engaged in the manufacture and selling and leasing of some form of shoe machinery or supplies. The bill alleges:

> "Thus the control of a complete line of 'principal' and 'auxiliary' machinery used in the bottoming of shoes became vested in one establishment. Before this no one company could supply such a line, nor can any company do so now outside the defendants."

The reason other manufacturers do not engage in making all the machines as the defendants do are not stated as specifically as they might be. Whether it is due to the fact that many of these machines, or some of them, are protected by letters patent, or what other reason there may be, might well be stated more explicitly, in order that the court may determine whether they are sufficient to sustain the conclusions of the pleader, who during the argument stated that some of these machines leased by the defendants are protected by letters patent and for that reason cannot be made by others. The

only reference to patented machines is in Exhibit 5, and refers to the Goodyear insole machine. But under the present liberal practice this is not sufficient to sustain a motion to dismiss, although it would be better pleading to set out more fully the reasons why other parties cannot manufacture all these machines. The effect is shown by Exhibit 13.

[13] *Is the complaint defective because it does not charge that the acts of the defendants were unduly and improperly exercised?*

It is claimed that in view of the construction of the Sherman Act in the Standard Oil and Tobacco cases, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, it is not sufficient to charge acts which may result in creating a monopoly, unless further shown that the actions of the parties were "unduly and improperly exercised." There can be no doubt that upon well-established principles of law the courts presume that Congress, when legislating upon a subject included in previous statutes, uses the same language found in the previous statute and if it had prior to the enactment of the later act been construed by the courts, especially the Supreme Court, it intended to adopt that construction as a part of the new act.

But is the language used in the Clayton Act, even if not identical, so similar to that used in the Sherman Act, construed in those cases, as to make that rule applicable? By referring to sections 1 and 2 of the Sherman Act (Comp. St. 1913, §§ 8820, 8821), it will be seen that Congress used merely generic words, without defining what spe[150]cific acts shall constitute restraint of trade or commerce, or a monopoly. The Chief Justice, in delivering the opinion of the court, said:

"The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of 'restraint of trade' as used in the statute leaves room for but one conclusion, which is that it was expressly designed not to unduly limit the application of the act by precise definitions, but while clearly fixing a standard; that is, by defining ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply

Opinion of the Court.

and enforce the public policy embodied in the statute, in every given case, whether any particular act or contract was within the contemplation of the statute."

On the other hand, the act now under consideration, instead of using the generic words of the Sherman Act, in plain and unequivocable language states what acts shall be unlawful, if they "substantially lessen competition or tend to create a monopoly." This being the case, the presumption is, not that Congress intended that the construction of the Sherman Act should control, but, on the contrary, that it should not control. Had Congress intended that the construction placed upon the Sherman Anti-Trust Act in those cases should apply to the Clayton Act, it would have used the same or like generic words, instead of defining what acts shall be unlawful, if the natural result of such acts tends to substantially lessen competition or create a monopoly in any line of commerce.

It will be noticed that in this act there is nothing said of combinations or conspiraces, nor that the parties complained of are monopolizing or attempting to monopolize any part of the commerce among the several States, as was required in the Sherman Act. This applies to the many cases cited by counsel for defendants on this point, all of which arose under the Sherman Act. Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do those acts, which may put it in his power to do so.

For these reasons, in the opinion of the court, all that is necessary to state a cause of action under the Clayton Act is to charge that the defendants committed the acts prohibited by the statute and that they tend to substantially lessen competition or create a monopoly in interstate commerce.

So far as the wisdom of the act is concerned the courts cannot question it. Congress alone can determine that. *Veazie Bank* v. *Fenno*, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482; *United States* v. *Union Pacific R. Co.*, 91 U. S. 72, 23 L. Ed. 224; *Angle* v. *Chicago, etc., R. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Hunter* v. *Pittsburgh*, 207 U. S. 161,

Opinion of the Court.

28 Sup. Ct. 40, 52 L. Ed. 151. As stated in the Employers' Liability cases, 207 U. S. 463, 492 (28 Sup. Ct. 141, 143, 52 L. Ed. 297):

"In testing constitutionality of an act of Congress this court confines itself to the power of Congress to pass the act, and may not consider any real or imaginary evils arising from its execution."

In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49, 33 Sup. Ct. 9, 15 (57 L. Ed. 107), Mr. Justice McKenna, speaking for the court, said:

[151] "The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of parties, and it may be, of some good results."

Or, as has been so tersely expressed by Judge Dyer when this case was before him ([D. C.] 227 Fed. 507, 511):

"If the course adopted by the defendants has the effect to stifle competition and create a monopoly within the law, then the law should be enforced, even if it resulted in going back to the awl and wooden peg."

Are the provisions in the leases requiring lessees to use lasting machinery to its full capacity, and in case the lessee shall have more machines adapted for doing the same work than is necessary, for a period of 12 consecutive months, the lessor can remove the machines not necessary, unreasonable?

These provisions are found in Exhibits 2 and 7. The court is unable to see anything unreasonable in these provisions. The only compensation for the use of the machines provided in the leases is the royalty upon the shoes manufactured on them. To permit the lessees to retain more machines than are necessary for the manufacture of his product would result in the lessors receiving no compensation therefor, consequently no return on the investment. As these provisions are only to be enforced if the machines are not used to their capacity for the period of 12 consecutive months, the court is unable to say that they are in violation of any provisions of the Clayton Act, or can in any way tend to substantially lessen competition or create a monopoly.

Is the act retroactive or retrospective, so as to apply as to leases entered into before the enactment of the act?

Opinion of the Court.

That question was fully discussed by counsel, but in the opinion of the court it is unnecessary to determine it on this motion, as on the final hearing there may be no such leases in force. If there should be, it will be time enough to determine that question then.

Is the act unconstitutional in attempting to apply it to patents previously granted?

Neither in the oral argument, nor in the elaborate briefs filed by counsel, was this ground of the motion urged. It may therefore be assumed that it has been abandoned by the defendants. But in any event the court can conceive of no reason why Congress cannot restrict the rights of patentees, if in its opinion they are used in a manner resulting in oppressing the public. A patent is merely a privilege granted to inventors by Congress, and whenever that privilege is abused or is found to be exercised in a manner contrary to the public policy of the Government, Congress certainly has the power to enact laws which will prevent such an abuse. Whether it can deprive a patentee of all the privileges granted by the patent before its expiration is a question which cannot arise under this act.

[14] Something was said in the oral argument about an impairment of contracts, but there is nothing in the Constitution of the United States which prohibits Congress from enacting legislation impairing the obligations of contracts. Article 1, § 10, applies to the States only, **[152]** and is not a limitation of the powers of Congress. *Legal Tender cases*, 79 U. S. (12 Wall.) 457, 547, 20 L. Ed. 287, et seq.; *Mitchell* v. *Clark*, 110 U. S. 633, 643, 4 Sup. Ct. 170, 312, 28 L. Ed. 279; *Evans-Snider-Buel Co.* v. *McFadden*, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900, affirmed *McFadden* v. *Evans-Snider-Buel Co.*, 185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1012.

This disposes of all the issues raised by the motion to dismiss, which is overruled.

Syllabus.

UNITED STATES v. ELTON ET AL.[a]

(District Court, S. D. New York. April 29, 1915.)

[222 Fed. Rep., 428.]

CRIMINAL LAW 322—PRESUMPTIONS—INTERSTATE COMMERCE COMMISSION.—In a prosecution for attempting to create a monopoly of transportation facilities in violation of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), where defendant pleaded immunity under Act Feb. 11, 1893, c. 83, 27 Stat. 443 (Comp. St. 1913, § 8577), on account of having given testimony before the Interstate Commerce Commission during an investigation of the affairs of certain railroad corporations, it would be presumed that the commission had power to carry on the hearing as one relating to the regulation of commerce between the States, and that it was therefore acting within its power in examining defendant.[a]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 728; Dec. Dig. 322.]

CRIMINAL LAW 42—IMMUNITY TO WITNESS.—Under Act Feb. 11, 1893, conferring immunity as to matters testified to before the Interstate Commerce Commission, such immunity is only conferred where the witness would have been privileged under Const. U. S. Amend. 5, and where such evidence is given under compulsion; but where the evidence is given without assertion of the constitutional privilege, or is declined to be given on any ground other than because of its incriminating tendency, immunity is not conferred, the statute having been passed with regard to the prior construction of the fifth amendment, under which an assertion of privilege is necessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45–48; Dec. Dig. 42.]

CRIMINAL LAW 42—IMMUNITY TO WITNESS.—Act Feb. 11, 1893, provides that no person shall be excused from testifying before the Interstate Commerce Commission on the ground that his testimony may incriminate him and that he shall not be prosecuted on account of such testimony. Defendant was subpœnaed, and testified under oath before the Interstate Commerce Commission as to an attempt to create a monopoly of transportation facilities in violation of the Sherman Act, after being led to believe that immunity would be given, and under threats that the commission would proceed criminally against any person testifying under a subpœna who refused to give his evidence. The commission had expressly refused immunity to others not sworn, and defendant had not conferred with counsel as to a possible waiver of immunity before testifying. He was subsequently indicted upon grounds as to which he

[a] Syllabus copyrighted, 1915, by West Publishing Company.

had testified before the commission. *Held*, that defendant was within the protection of the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45–48; Dec. Dig. 42.]

James S. Elton was indicted for conspiring with others to create a monopoly of transportation facilities. On demurrer to special plea in bar. Demurrer overruled.

[429] *H. Snowden Marshall*, U. S. Atty., of New York City, *R. L. Batts* and *Frank M. Swacker*, Sp. Asst. Attys. Gen. (*Robert P. Stephenson* and *James W. Osborne*, Asst. U. S. Attys., both of New York City, of counsel).

Sullivan & Cromwell, of New York City (*Royall Victor* and *Edward H. Green*, both of New York City, of counsel), for defendant Elton.

HUNT, Circuit Judge.

The plea alleges these facts:

The Interstate Commerce Commission on May 6, 1912, on a complaint made, duly inquired into the prices and rate matters and other affairs of the New Haven Railroad Company and other New England corporations. The carriers were represented by counsel. Thereafter, about June 20, 1913, the commission filed its report. New England Investigation, 27 Interst. Com. Com'n R. 560.

The findings of the commission, filed June 20, 1913, among other things, were to the effect that the then present management of the New Haven Company started out with the purpose of controlling the transportation facilities of New England, and that, in addition to the matter of high rates, the commission had considered the purchase by the New Haven of a preponderating influence of stock in the Boston & Maine Railroad. The commission advised no advance in rates until the management of the New Haven and Boston & Maine was more prudent.

The commission stated that originally they intended to subpœna Mr. Mellen, but that, the whole subject being under investigation by the Department of Justice, exami-

nation of Mr. Mellen, who was then president of the New Haven Company, would have given him immunity, wherefore the commission decided not to call Mr. Mellen as a witness, but to give him an opportunity to make any explanation he desired not under oath. 27 Interst. Com. Com'n. R. 587.

During the investigation and taking of testimony, the then chairman of the Interstate Commerce Commission, about April 21, 1913, stated that it had been his intention to ask the officials of the New Haven Company to appear and testify in relation to figures which the commission had obtained. The statement of the chairman of the commission was to the further effect that the witnesses were not produced and the commission was asked to subpœna them, but thereafter it occurred to the chairman that if the witnesses were brought before him under subpœna it might interfere with some proceedings which the Department of Justice might have on hand; that it was intimated to the commission that the Department of Justice then had the whole New England railroad situation under consideration, with a view of possibly asking indictment of the officials of the New Haven for having conspired to monopolize the transportation facilities of New England; that no such attempt to indict might be made, but that it was evident that examination concerning the matters under consideration would give the particular persons referred to immunity from prosecution; and that, inasmuch as the commission did not wish to interfere with the Department of Justice administering the Sherman Act, the chairman believed the commission could not properly subpœna or swear the witnesses, nor, indeed, allow them to testify under oath if they came voluntarily.

[430] Further allegations of the plea are that about August 24, 1912, the Panama Canal Act (act Aug. 24, 1912, c. 390, 37 Stat. 560), giving to the commission jurisdiction for the determination of facts as to competition between carriers, was passed, and that about March 1, 1913, the amendatory act pertaining to the valuation of railroad property and securing information concerning railroad stocks,

bonds, and other securities, was enacted. It is recited that the latter act gave authority to examine witnesses and to investigate and report on the history and organization of any railroad corporation, and conferred power to inquire into its financial arrangements, reorganization schemes, and matters of like character; that on February 9, 1914, the commission, after reciting a resolution of the Senate of the United States authorizing reopening the examination of the affairs of the New Haven Company and the making of further investigation of its financial transactions, ordered such reopening and further examination as might be proper; that thereafter the commission proceeded to investigate and to hear testimony pertaining to the New Haven road and other carriers, and during the course of such investigation heard witnesses and took testimony; that while the investigation was going on the first two witnesses called were H. P. Whipple and Samuel Hemingway. These two declined to testify or to answer most of the questions asked of them by counsel for the commission. It appears then that the commission notified the witnesses that their refusal to answer would be laid before the grand jury and indictments would be sought against them on account of such refusals, unless they promptly withdrew their refusals and agreed to testify. The plea of Elton sets forth that the refusal of the witness Hemingway to answer was laid before the grand jury of the District of Columbia at the instance of the Interstate Commerce Commission, and counsel for Hemingway was advised by counsel for the Interstate Commerce Commission of this fact, and thereupon Hemingway agreed to testify and the commission proceeded; that about May 1, 1914, when Hemingway was testifying, the following occurred between Mr. Cummings, counsel for the witnesses, and Mr. Folk, counsel for the Interstate Commerce Commission:

"Mr. Cummings: I am perfectly willing, in view of transactions that have taken place, threats that have been made, and various collateral suggestions, to have the witness go on the stand and tell all that he knows, frankly, fully, and completely, concerning the relations of the Billard Company with the New Haven Company, or any of its subsidiaries——

"Mr. Folk: Let me state right here: Mr. Cummings has had something to say regarding threats. I think it would be well for the

record, in view of his statement, to show that this witness, at a former hearing, refused to testify—declined to answer questions on the advice of counsel; that his refusal was taken up before the Federal grand jury under the act known as the Compulsory Testimony act, with the result that the witness was given the option of testifying or standing trial by reason of the proceedings mentioned." (P. 341, S. Doc. 543, 63d Cong., 2d sess.)

It is set forth that Mr. Folk, as counsel for the commission, on the same day, but at a later time, stated publicly as follows:

"Mr. Folk: I merely wish to state this for the benefit of the record: Mr. Cummings says he advised the witness that the contemplated criminal pro[431]ceedings could not be serious and could not be maintained. These proceedings were undertaken in good faith, and if the witness had not appeared to testify in good faith he would have been placed upon trial, and I disagree with Mr. Cummings as to the result of that trial. I believe, under the statute, he would have been convicted, and the commission, in every instance hereafter, where the witness refuses to testify without good reason, will proceed under the criminal section of the law mentioned." P. 433 S. Doc. 543.)

Elton sets forth that by letter dated May 26, 1914, defendant Ledyard was notified that the commission withdrew the subpœna which had been issued for him and canceled the same and relieved him of all compulsion to appear before the commission as a witness, but advised him that, if he desired to appear voluntarily, "waiving all immunity by the testimony," he might so advise the commission, and the question of his being a witness would then be determined. It appears then that about June 4, 1914, the defendant Ledyard appeared, but was not allowed to be sworn as a witness, and was notified that whatever he might say would be used against him, but he expressed his readiness to testify and did testify. Defendant Cuyler made a statement, not under oath; counsel for the Interstate Commerce Commission expressly having it put on the record that Mr. Cuyler was called in behalf of the New Haven Company, and not on the behalf of the commission, and was not sworn.

Elton then says that he testified in obedience to a subpœna, after having been duly sworn as a witness, and without any exaction by the commission, or any giving to him of any express waiver of immunity or express declaration of

voluntariness of his testimony. He says that during the investigation the representatives of certain other defendants named in the indictment, who were not subpœnaed and sworn, were not permitted to testify, the commission having publicly stated that they were not sworn, because the commission did not desire to give to such other defendants immunity from criminal prosecution, or to interfere with the plans or desires of the Department of Justice to any further extent than the commission should feel necessary in the performance of its duties.

It is then alleged that the commission made its report about July 11, 1914, and that in this report the commission used the following language:

"The purpose of the immunity statute, as the commission understands it, was to aid in the search for facts by removing the obstacle of witnesses refusing to testify on the ground of self-incrimination, and under the statute the commission has always endeavored to exercise a sound discretion in this regard. In carrying out the instructions of the Senate in this case the commission has therefore kept in mind the warning of the Department of Justice to carefully consider before placing a witness upon the stand the effect his testimony might have in the way of immunizing him from criminal prosecution. The commission has only used such witnesses as seemed necessary to fully answer the Senate's inquiry, and has refrained from calling those witnesses whose evidence, while interesting, might be merely cumulative."

Defendant says that it was believed throughout the investigation that if he testified in obedience to the subpœna, he should and would receive immunity from prosecution on account of the transactions, matters, or things concerning which he would testify to, and he says [432] that the commission caused him to believe this way, and that he did believe that he would be protected against any such prosecution and would receive immunity from and against the same; that he testified unwillingly, and in the light and knowledge of the experiences of Hemingway and others and with a knowledge of the compulsory testimony act of February 11, 1893, and with a knowledge of the threats of the counsel of the commission of criminal prosecution, if he failed or refused to testify, and with an understanding of the fact that the commission had exacted from defendants Ledyard and Cuy-

ler express waivers of immunity and express declarations of voluntariness of their testimony.

His plea also sets forth that about April 9, 1914, before testimony was heard upon the reopened investigation, the Attorney General of the United States wrote to the Interstate Commerce Commission and cautioned them of the effect of an examination of persons connected with the New Haven road where subpœnas were issued, and that thereafter, about May 12, 1914, the Attorney General again communicated with the commission, cautioning them to consider the effect of the examination of certain witnesses upon any criminal prosecution which the Government might desire to institute against certain persons for matters connected with the affairs of the New Haven Company. It appears that the letters which passed between the Attorney General and the commission and the history of the "threat" of counsel for the commission to Hemingway were reported in the public press and read by the defendant, and that the letters of the Attorney General warned the commission and advised them that witnesses testifying under oath and in obedience to the subpœna of the commission, including this defendant, might claim that they thereby became immune from and against prosecution.

Elton says that a number of days before defendant testified before the commission he had a long personal conference with the counsel for the commission, and told him of the nature of the testimony which he would give, and that he made the statements to the counsel at the request of counsel for the commission, and at conferences arranged for and solicited by counsel for the commission.

Defendant says he went from his home in response to subpœna about May 13, 1914, had conferences with counsel for the commission, and testified before the commission under oath concerning the substantial transactions and things alleged in the indictment, charged to constitute a combination to monopolize part of the commerce among the several States of the United States, and that when he testified before the commission he was fully advised of the declarations made by counsel for the commission already referred to, to

the effect that criminal prosecution would be instituted by the commission against any person under subpœna from the commission in the proceeding who should refuse or decline to give testimony.

It also pleaded that J. W. H. Crim, an attorney at law, acted as counsel for C. S. Mellen, formerly president of the New Haven Company; that Crim was under advice from Mellen to advise all officers and directors of the New Haven Company on matters concerning the [433] investigation of the affairs of their company, and that defendant relied to a great extent upon Crim protecting the personal rights he (defendant) might have in, or derive from, the investigation; that during the weeks prior to the defendant's testimony Crim held conferences with counsel for the commission to discuss whether a natural person who should testify before the commission under oath, in obedience to a subpœna, would receive immunity from criminal prosecution under the acts of Congress on account of the matters and things concerning which such persons should testify, and that Crim and counsel for the commission conferred and discussed the question of immunity, and that counsel for the commission often stated to Crim in substance that any person so testifying would secure immunity from criminal prosecution, and that any witnesses who refused to so testify would be indicted by the grand jury for the District of Columbia, and that counsel for the commission stated to Crim in substance that all persons who might testify under oath and in response to subpœnas would secure immunity from prosecution; that certain persons would be examined, but not under oath, for the reason that the commission did not desire to grant immunity to such persons, and that the commission, therefore, called defendant as its witness without requesting him to waive immunity or warning him that anything to which he might testify would be used against him in any other proceeding; that Crim was present when defendant was sworn and testified, and counsel for the commission was present, and they had in mind the conferences which had been had, and defendant says the commission believed then that any natural person testifying under oath would thereby

secure immunity, and that said Crim believed that it was intended by counsel for the commission that immunity should be given.

The plea then concludes with the statement that, in view of the facts set forth, none of the testimony given by defendant upon the investigation referred to was given voluntarily, but was given entirely and wholly under compulsion, and under the threats of the Interstate Commerce Commission of criminal prosecution in the event of his refusal to give such testimony, and that his testimony was in pursuance of an understanding by the commission and defendant that his testimony would be and was given only under compulsion, and that defendant would be immune from any prosecution for the testimony he gave. Defendant says that he testified fully concerning the things for and on account of which he is now under indictment and being prosecuted. He quotes part of the testimony which he gave, and which shows that at a meeting of the board of directors of the New Haven Company the question of violation of the Sherman Law in consolidation of concerns was considered and discussed. He says that he testified concerning the ownership and operation and participation in matters involved in the offenses charged in the indictment; that when he testified counsel for the commission knew substantially all of the testimony which he could give; that he is a business man 76 years old, and that he never conferred with counsel or received any advice of counsel during his testimony with respect to any of the matters set forth in the plea.

[434] The Government has filed a demurrer, and so raises the broad question of the sufficiency of the plea. It appears that, upon a former indictment against this defendant for the same offense herein charged, defendant set up, as he does here, in bar of the prosecution, immunity which he claimed to have received because of evidence given by him before the Interstate Commerce Commission relating to the transactions which formed the basis of the indictment to which defendant then pleaded. That indictment, however, has been abandoned, and the Government is proceding under a new indictment charging the same offense. Many more

facts are set forth in the present plea, but the legal questions which were presented to Judge Grubb are, in the main, the same as those now before the court. The Government then, as now, demurred upon these grounds:

(1) That the plea fails to show that the testimony was given pursuant to the requirement by the Interstate Commerce Commission in a proceeding in which the commission had the power to compel the attendance and testimony of witnesses and the production of documents and for that reason was not given under legal compulsion within the meaning of the immunity statute; and (2) that the witness did not assert his constitutional privilege of declining to answer when sworn before the Interstate Commerce Commission, upon the ground that his answer would tend to incriminate him, and that his answers were not compulsory in the absence of such an assertion of his privilege, and did not earn him the immunity conferred by the statute. The learned judge gave no decision upon the first ground, but did upon the second.

[1] Argument made on behalf of the Government is that the inquiry by the Interstate Commerce Commission at which this defendant testified, and which was carried on under an order made pursuant to the Senate resolution heretofore referred to, was beyond the limit of the judicial functions of the Interstate Commerce Commission, and that, notwithstanding the appearance of this defendant under a subpœna before the commission and the direct inquiry of him into the matters about which he did testify, as set forth in his plea, the proceeding wherein he testified was not one to which the immunity statute applies. The position thus assumed by counsel for the Government presents a far-reaching question. The suggestion of it seems irreconcilable with the attitude taken by counsel for the Interstate Commerce Commission, a most important administrative body of the Government when, in May and June 1914, acting in good faith, the commission subpœnaed this defendant and had him testify before it concerning attempts to monopolize part of the commerce of the United States, and when counsel for the commission made the declarations which he did

in relation to the position of the commission toward witnesses there attending or to attend with respect to the affairs of the New Haven Railroad. The commission, however, is not before the court by its counsel to support the position which it assumed when the proceedings involved were had, and until I have had an opportunity to hear counsel for the commission I shall harmonize my views with the presumption that the commission had the power to carry on the hearing as one related to the regulation of commerce between the States, over which [435] the commission had general jurisdiction, and I shall hold that the commission kept within its power in examining this defendant, and that in its investigation it did not go outside of the limits of its authority.

[2] Upon the second ground Judge Grubb decided positively that, by the act of Congress conferring immunity in certain cases (act Feb. 11, 1893), testimony which had been unavailable under the privilege of silence was made available. The learned judge reasoned that testimony was unavailable under the amendment where the witness showed to the tribunal calling for the testimony that giving it might reasonably tend to incriminate him, and that, inasmuch as such testimony could not be compelled because of the constitutional amendment, Congress was impelled to act, and that the act of Congress referred to could only have been intended to cover testimony which the Government was unable to obtain because of a witness declining to answer based upon the incriminating tendency of the testimony and under the protection of the fifth amendment. He ruled that no purpose existed in the mind of Congress to bestow immunity in cases where doing so was not necessary to obtain testimony which could otherwise be refused, and his conclusion was that the Immunity act was intended only to make available testimony compulsorily given and only to reward the unwilling giver of such evidence, but that evidence given without the assertion of the constitutional privilege, or declined to be given upon any ground other than because of its incriminating tendency, is not compulsory testimony under the fifth amendment and has always been available. Therefore, he reasoned, necessity for conferring immunity on the giver of such tes-

timony not having existed, Congress should not be regarded as having given such immunity, if the language of the statute may be reasonably otherwise construed.

With ability counsel for Elton and other defendants have earnestly urged that it is fundamentally erroneous to say that the fifth amendment to the Constitution applies only to witnesses who may be characterized as unwilling or involuntary ones. They argue that the fifth amendment applies to everybody, and confers the option or privilege of refusing to answer any incriminating question in any court or investigation, and that it is the duty of every court and investigating body to uphold the witness in his assertion of such option or privilege, which is purely personal to the witness. Counsel say that under the immunity statute the promise held out to the witness is one of the things which the witness considers before he answers the question put, and that he waives nothing and makes no election, as he does when he exercises his option or privilege under the fifth amendment. They would distinguish between the fifth amendment, which they say operates the moment that the witness testified, by saying to him that he can refuse to answer if he so desires, and the immunity statute, which refers to the time when the witness is prosecuted for the transaction or thing concerning which he has already testified. No violation, so it is argued, of the immunity statute is made by the Government in exacting the answers of the witness, and not until criminal action is brought against the witness for or on account of the transaction concerning which he has testified does the Government invade his rights.

[436] The argument along these lines leads them to say that an assertion of the constitutional privilege is an unnecessary condition to the enjoyment of immunity under the immunity statutes referred to, and that, under the statutes in question, an assertion of privilege would be useless. There is a practical view in the question: What does it avail one who asserts the privilege if the statute says he shall answer the question or accept the alternative of being indicted for crime under the provisions of the statute which grants him the immunity he seeks? And, inasmuch as the statute says

that he shall be compelled to answer the question, why should he claim his privilege as a condition necessary for the preservation of his constitutional right under the fifth amendment?

We all agree, of course, that a proper construction of the statute demands that it be read as coterminous with the fifth amendment to the Constitution. It may well be that broad construction of the fifth amendment is warrant for sustaining the contentions of the defendant to the effect that the statutory specification of those who shall receive immunity include this defendant and others similarly situated. But, on the other hand, as well pointed out by Judge Grubb, the immunity statute was passed with regard for the construction already put upon the fifth amendment, and in the knowledge that the assertion of the privilege before examination is in itself important, and that, unless the privilege is asserted the witness will be given no immunity, and, should he testify only after the denial of the privilege, then only can he say that his evidence has been compulsorily furnished, and that, therefore, he is entitled to immunity. Thus, option may rest with the Government and may not be exercised until after the witness has asserted privilege.

Discussion, however, need not here be carried farther. The whole question was argued before Judge Grubb. He had the aid of learned counsel for the defendant and for the Government. He gave to the matter full deliberation, has construed the statute in the light of certain expressions of the Supreme Court, and until his decision is reversed or modified by a higher court I shall regard it as a just declaration of the law.

[3] There is, therefore, but this question left: Were the facts and circumstances set forth in the plea in bar as surrounding and connected with the giving of the testimony such that the defendant can now claim that he testified unwillingly and compulsorily, and is therefore fairly entitled to immunity? Without repeating them, it is fairly apparent that the defendant, who was obeying a subpœna, was given to believe that he would be immune if he testified before the commission, and that, acting under such belief.

he gave the vitally important evidence which related to the very transactions upon which the indictment herein is based. The testimony of defendant even went to the extent of positive statements concerning what had been the intention of himself and other directors of the New Haven Company in and about the formation of a transportation monopoly which would violate the provisions of the monopoly statutes of the United States. Defendant had heard the statements of counsel for the commission warning [437] persons situated as he was that the commission intended to proceed criminally against any person testifying under a subpœna and who refused to give his evidence. It is true, as quoted hereinbefore, counsel for the commission said that procedure under the criminal section of the immunity statutes would be had where the witness refused to testify "without good reason"; but it is fairly to be inferred that in the mind of counsel for the commission refusal to testify upon the ground of self-incrimination was not considered a good reason, because the statute provided that such a reason, if advanced, would not excuse the witness from testifying.

The plea shows that defendant did not confer with counsel prior to the giving of his testimony. He knew that the commission had deliberately declined to permit certain other witnesses to be sworn, and that there had been an express requirement that such other witnesses should waive immunity and should make acknowledgment that their statements were being voluntarily given. No advice appears to have been given to this defendant before he was put under oath, nor was he told of his possible waiver of immunity. He was under the actual belief that the commission intended to give him immunity and that he would receive it.

These and the other things set forth, when considered with due regard to the rights of both the Government and of the defendant, show that the purpose of the commission was to secure the important testimony which this defendant furnished, and was to give immunity to him for giving it. And when the commission expressly refused such immunity to others, not sworn, they made a whole situation where, by contrast, the belief that this defendant should and would be

immune was emphasized; hence, in justice, he may now insist that the power of the Government should be stayed as against this prosecution of him for and on account of the transactions concerning which he testified.

The demurrer to the plea is overruled.

UNITED STATES *v.* ROCKEFELLER ET AL.

(District Court, S. D. New York. April 16, 1915.)

[222 Fed. Rep., 534.]

CRIMINAL LAW 622—TRIAL—SEVERANCE.—In a prosecution of the directors of a railroad company for the violation of the Anti-Trust Act, where it appeared that a suit had been several years before instituted against the corporation, charging it with violating that act in making certain combinations, which suit had later been dismissed by the Attorney General for the stated reason that the legislature of the State which was most affected by the principal combination had enacted a law permitting such combination under certain conditions and restrictions, intended to safeguard the rights of the people, and that the other combinations had been declared ultra vires and were being discontinued, the directors who had been elected to the board after the discontinuance of the former suit are entitled to a separate trial, since the evidence as to them would be different, and their defenses different, and might be antagonistic to the defense of the other directors.[a]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1390; Dec. Dig. § 622.]

William Rockefeller and others were indicted for a violation of the Anti-Trust Law, and defendants Baker and others apply for a severance. Applications granted.

See also 221 Fed. 462.

H. Snowden Marshall, U. S. Atty., of New York City, and *R. L. Batts* and *Frank M. Swacker*, Sp. Asst. Attys. Gen. (*Robert P. Stephenson*, Asst. U. S. Atty., and *James W. Osborne*, Asst. U. S. Atty., both of New York City, of counsel), for the United States.

Spooner & Cotton, of New York City, for (
Baker.

Morgan J. O'Brien, of New York City, for defendants Cuyler, Milligan, and Maxwell.

L. C. Krauthoff, of New York City, for defendant Vail.

HUNT, Circuit Judge.

The several applications made by the defendants Baker, Milligan, Maxwell, Cuyler, and Vail for a severance are granted. None of the five moving defendants was a director of the New Haven Company prior to May 22, 1908. Defendant Baker was elected a director on February 11. 1910. Defendant Cuyler was elected on October 26, 1910, and defendants Vail, Maxwell, and Milligan on May 18, 1911.

It appears that upon May 22, 1908, the Attorney General of the United States filed a bill in the United States Circuit Court in Massachusetts against the New Haven Company and others, charging violations of the Anti-Trust Law of the United States, and that on June 26, 1909, by direction of the Attorney General, the above referred to suit was discontinued. On June 25, 1909, the Senate of the United [585] States passed a resolution, and on the same day the Attorney General made a reply thereto. Copies of such resolution and the reply thereto are referred to by counsel who have presented these motions. The substance of the resolution of the Senate was a direction that the Attorney General inform the Senate whether the legal proceedings against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Railroad Company for violation of the Anti-Trust Law had been dismissed, and, if any statement had been given out by the Attorney General, that he attach a copy of such statement to his reply to the resolution, and to inform the Senate when such proceedings were begun and instituted. The Attorney General, under date of June 25, 1909, replied that he had directed the United States attorney for the district of Massachusetts to dismiss the legal proceeding brought by the United States against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Railroad Company for violation of the Anti-Trust Law, and that he

had given out a statement touching the matter, copy of which statement he inclosed with his communication to the Senate. He advised the Senate that the proceedings were begun by the filing of a bill in equity in the Circuit Court for the District of Massachusetts on May 22, 1908.

The copy of statement which accompanied the letter of the Attorney General was dated June 24, 1909. It referred to an act of the Legislature of Massachusetts just theretofore approved, creating the Boston & Maine Railroad Holding Company, and giving authority to the new corporation to acquire and hold the stock and bonds of the Boston & Maine Railroad Company, and authorizing any railroad corporation theretofore incorporated under the laws of Massachusetts to acquire and hold the stock and bonds of the Boston Holding Company. Further substance of the statement was that the purpose and effect of the Massachusetts statute, as publicly announced and contemplated by its terms, was to authorize the consolidation of the Boston & Maine and New York, New Haven & Hartford Railroad Company by the Boston Holding Company first acquiring control of the Boston & Maine Railroad Company, and then by the New York, New Haven & Hartford Company acquiring the control of the Boston Holding Company; that the Massachusetts statute also provided that the stock of the Boston & Maine to be acquired by the Holding Company should not afterwards be sold without express authority from the legislature; that the stock of the Holding Company, if acquired by the New Haven road, should not be sold without authority of the legislature; that the Commonwealth of Massachusetts might, by legislative action, upon one year's notice, take for its own use, by purchase or otherwise, all the stock and bonds of the Holding Company upon certain terms designed to protect creditors and secure just compensation, the whole plan and purpose being to promote the consolidation of the Boston & Maine with the New Haven Company and to provide for their operation hereafter under one management, with safeguards to protect the interests of the people of Massachusetts; that
iew of the fact that the suit of the Government the
st the New Haven and the Boston & Main

Opinion of the Court.

companies for violation of the Anti-Trust Act rested almost [536] entirely upon a claim that those companies had already consolidated by means of stock ownership, and since the State of Massachusetts was most directly affected, and since the laws of that State now expressly authorize such consolidation, the Attorney General had determined to dismiss the suit by the Government. The statement then went on to say that in the suit brought complaint had been made that the New Haven Railroad had acquired a number of trolley lines in Massachusetts and adjoining States, and that this was a combination in restraint of interstate commerce, but that, since the suit by the Government had been determined upon, the Supreme Court of Massachusetts, in a case involving the right of the New Haven to acquire trolley properties in Massachusetts, had decided that that railroad company had no such power, and that the company had been parting with such trolley properties. The Attorney General in the statement expressed his conviction that, whatever might have been the merit of the claim when the suit was begun, there was not, at the time he made the statement, any such element of competition in interstate commerce by reason of such ownership of trolley lines as would justify a further prosecution of the suit by the Government. The statement concluded by saying that the Attorney General had directed that the case of the Government against the New York, New Haven & Hartford Railroad Company and the Boston & Maine Company should be dismissed at once.

There is no dispute, at present, at least, of the statements made by counsel for these defendants that each defendant believed that, at the time he entered the board of the New Haven Company, all controversies with the Government of the United States, and all questions of violations of the Anti-Trust Law, had been finally disposed of; and it would seem that no investigation or controversy concerning the subject was pending at that time. Such a situation may well have induced the belief that the board of directors would be, to a great extent, engaged in working through whatsoever complications had arisen in connection with the

concerns of the New Haven Company resulting from transactions and causes which had arisen prior to the election of any one of these defendants, and it may be that each of these defendants went upon the board with the purpose of protecting the interests of the stockholders and of the corporation itself. At all events, enough appears to justify the view that the questions to be presented on the trial of these several defendants will probably be materially different from those which will be involved in the trial of the other defendants, with whom they have been jointly charged. Nor is it difficult to foresee possible serious antagonism between the positions of defense to be taken by these defendants and others charged jointly. Indeed, counsel for the United States frankly state that such a situation may arise, and that they do not oppose the severance applied for.

I therefore think these defendants ought not to be required to go to the inconvenience and expense incidental to the preparation for a long trial, which will probably extend to many matters in no way related to any one of themselves.

KELLOGG TOASTED CORN FLAKE CO. v. BUCK.

(District Court, S. D. California, S. D. September 2, 1913.)

[208 Fed. Rep., 383.]

CONTRACTS (§ 116)—MONOPOLIES (§ 17)—PATENTED ARTICLES—SALE—PRICE RESTRICTIONS.—Where a patented article has passed into the channels of trade and reached a retail dealer, the manufacturing patentee is not entitled to enforce a price restriction agreement for the purpose of preventing competition as against such retailer; such restriction being void both at common law and under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting monopolies, etc.*

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116; Monopolies, Cent. Dig. § 10; Dec. Dig. § 17.]

In Equity. Suit by the Kellogg Toasted Corn Flake Company, a corporation, against W. A. Buck. On motion to Granted.

Henry J. Brodsky, of San Francisco, Cal., and *Loeb & Loeb*, of Los Angeles, Cal., for plaintiff.

Hiatt & Selby, of Los Angeles, Cal., for defendant.

WELLBORN, District Judge.

I am of opinion that the restrictions here sought to be enforced are invalid, both at common law and under act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). The case made by the bill falls within *Dr. Miles Medical* [384] *Co.* v. *Park & Sons Co.*, 220 U. S. 373, 408, 31 Sup. Ct. 376, 385 (55 L. Ed. 502), wherein the court declares broadly, underscoring mine:

"The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. * * * And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. *The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.*"

The recent case of *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, decided May 26, 1913, which is the latest one called to my attention, construes the former case thus:

"The question, therefore, now before this court for judicial determination is: May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber, who has paid to the agent of the patentee the full price asked for the article sold? The object of the notice is said to be to effectually maintain prices and to prevent ruinous competition by the cutting of prices in sales of the patented article. That such purpose could not be accomplished by agreements concerning articles not protected by the patent monopoly was settled by this court in the case of *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 [31 Sup. Ct. 376, 55 L. Ed. 502], in which it was held that an attempt to thus fix the price of an article of general use would be against public policy and void."

Since both of these decisions are by the Supreme Court of the United States, and, of course, authoritative here, it is

Syllabus.

unnecessary to review the large number of other cases, both State and Federal, bearing upon the question.

Said motion will be allowed.

UNITED STATES v. KELLOGG TOASTED CORN FLAKE CO. ET AL.

(District Court, E. D. Michigan, S. D. April 14, 1915.)

[222 Fed. Rep., 725.]

MONOPOLIES 17—RESTRAINT OF TRADE—PRICE RESTRICTIONS ON RESALE—SALE IN PATENTED CARTONS.—A manufacturer cannot, without violating Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, in connection with an absolute sale of its product (though with the patented cartons containing it) to a jobber, control the price at which the package shall be resold by the jobber, or by the retailers who buy from the jobber.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 24—PETITION—STRIKING OUT MATTER—IRRELEVANCY.—The allegation in the petition, attacking as violative of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, price restrictions imposed by a manufacturer on the resale of its product, packed in patented cartons, that it resorts to the cartons as a subterfuge to evade such law, is not so clearly irrelevant as to justify its elimination on motion to strike, though the fact of the cartons being resorted to as a subterfuge be not necessary to lack of protection of the transaction by the patent.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

MONOPOLIES 17—NECESSITY OF VALID CONTRACT.—Restraint and monopoly being actually effected by price restrictions on resales, imposed by a manufacturer in the absolute sale of its product, it [726] is not necessary that they constitute a valid contract, to be violative of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 17—EVIDENCE—PRIOR TRANSACTIONS.—As elucidating the effect and intent of a plan of sale by a manufacturer of its product, relative to its violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, a prior plan of sale may properly be considered.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

In Equity. Suit by the United States against the Kellogg Toasted Corn Flake Company and others. Heard on motions. Granted in part and denied in part.

Clyde I. Webster, U. S. Atty., of Detroit, Mich., for the United States.

Chappell & Earl, of Kalamazoo, Mich., for defendants.

Before WARRINGTON and KNAPPEN, Circuit Judges, and TUTTLE, District Judge.

PER CURIAM.

The United States filed its petition in equity under section 4 of the Anti-Trust Act of July 2, 1890, attacking, as violative of sections 1, 2, and 3 of the act, certain price restrictions imposed by the manufacturers upon the resale of Kellogg's Toasted Corn Flakes. The case is before us under the Expedition Act. The pertinent allegations of the petition may be thus summarized:

The defendant corporation, which is the owner of the Byrne patent (No. 1,020,536, March 19, 1912), on cartons or packages, manufactures at Battle Creek, Mich., its "corn flakes," which is a breakfast food, selling the product in interstate commerce; sales being made directly to jobbers of cases containing 36 cartons (made under the Byrne patent) filled with its corn flakes, refusing to sell the goods direct to the consumer or the retail trade. The jobbers sell by the case to the retailer, and the latter by package to the consumer. The manufacturer sells at the uniform price of $2.50 per case, exacting from the jobber an agreement to charge the retailer a specified price, uniform in each section (and ranging from $2.75 upwards per case); the jobber's default in this agreement authorizing the manufacturer to refuse to deal further with him. This provision has been strictly enforced by defendants, who refuse to continue dealings with any jobber who fails to maintain prices so fixed. For the purpose and with the intention of fixing and enforcing the observance by the retailer of an absolutely fixed price to the consumer, there is printed on the carton the notice found in

the margin of this opinion.[a] Defendants claim that the re-[727] tailer's purchase, and his undertaking after such notice to sell, amounts to an agrement by him to maintain the specified price. The value of the carton is negligible as compared with the value of the contents, and its purchase is a mere incident in the contract of sale; the contents forming the sole consideration therefor, and being all the purchaser desires. This plan of sale and distribution results generally in an exacting of uniform prices by jobbers in a designated section and absolutely by retailers, and thus in lack of competition between either jobbers or retailers which can affect the cost of the product to either retailer or the consumer, and to restraint upon and monopoly of interstate commerce.

The petition contains further allegations, likewise summarized: (*a*) Previous to the use of the patented cartons, the manufacturer, by a notice inclosed in the case, required the retailer to sell each package at a fixed price, under penalty of paying certain liquidated damages and to assent to the refusal of further supplies until damages are paid and assurance given that the offense would not be repeated, and a recital that opening the package operates as an admission of the purchaser's understanding and assent to these stipulations; (*b*) that defendants, having sold the cartons and their contents to the jobbers, parted with all title thereto, and have no legal power to fix the price at which the purchaser from the jobber shall sell the same; (*c*) the use of the cartons is resorted to as a mere subterfuge and device to avoid the provisions of the Anti-Trust Law and pertinent principles of the common law. (An allegation that the carton was non-patentable will be treated as withdrawn, in view of plaintiff's motion for leave to do so.)

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[a] "This package and its contents are *sold conditionally* by us with the distinct understanding, which understanding is a condition of the sale, that the package and contents shall not be retailed, nor advertised, nor offered for sale at less than 10 cents per package. Retailing the package at less than 10 cents per package is a violation of the conditions of sale, and is an infringement on our patent rights, and renders the vendor liable to prosecution as an infringer.

"KELLOGG TOASTED CORN FLAKE COMPANY,
"*Battle Creek, Michigan.*"

Plaintiff asks that the selling plan in question be declared violative of the Anti-Trust Act, for injunction in terms designed to prevent its further employment, and for general relief. The present hearing is on, first, the motion, under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), to strike out the paragraphs of the petition, which, as summarized, we have indicated, respectively, as (*a*), (*b*), and (*c*) above (this motion being made by defendants other than Wilfred C. Kellogg, who has answered and disclaimed), and to dismiss the petition as thus reformed; and, second, plaintiff's motion to amend the petition by adding further allegations (which we likewise summarize in substance sufficient for purposes of this opinion) as follows:

(1) Defendant's product is made from corn. By extensive advertising and especially by enforcement of the selling plan mentioned, a large demand for the food has been created, trade and commerce therein exceeding that of any other breakfast food made from corn—an attempt to monopolize the entire trade and commerce in breakfast foods, and especially in such foods made from corn, being charged; and that this attempt is or will be entirely or in a large measure successful, from the fact that defendant's plan offers a special inducement to retailers, by enabling them to realize a handsome profit from the sale of corn flakes without fear of being undersold by competitors; (2) that the price received by the manufacturer is a full and adequate compensation for the goods sold, and the only consideration which the manufacturer receives or intends to exact as the purchase price for the goods; the retailers likewise considering that their acceptance of the [728] product with knowledge of the contents of the notice constitutes a binding contract to maintain the price specified therein and to observe the conditions of the notice as such contract, thereby entering into an agreement or combination with defendant corporation to maintain the prices so specified.

The broad questions presented are (1) whether a manufacturer, in connection with an absolute sale of its product (and the patented package containing it) to a jobber, may lawfully control the price at which the complete package

Opinion of the Court.

shall be resold by the jobber or by the retailers who buy from the jobber; and (2) whether the selling plan in question effects, under the allegations of the petition, an unlawful restraint or monopoly, actual or attempted.

[1] The general rule is well settled that a system of contracts between manufacturers, jobbers, and retailers, by which the manufacturers attempt to control the prices for all sales by all dealers, at wholesale or retail, whether purchasers or sub-purchasers, eliminating all competition and fixing the amount which the consumer shall pay, amounts to restraint of trade, and is invalid both at common law and, so far as it affects interstate commerce, under the Sherman Anti-Trust Act. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 400, 31 Sup. Ct. 376, 55 L. Ed. 502; *John D. Park & Sons Co. v. Hartman* (C. C. A. 6) 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135. The cases cited hold specifically that such agreements are not excepted from the general rule by the fact that they relate to proprietary products manufactured under secret process. By the cases of *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 350, 28 Sup. Ct. 772, 52 L. Ed. 1086, and *Straus v. American Pub. Ass'n*, 231 U. S. 222, 234, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369, it is settled that the protection of the copyright act does not secure to the owner of the copyright the right to qualify future sales by his vendee, or to limit or restrict such future sales to a specified price.

Coming to the right secured by patents upon inventions: In *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 22 Sup. Ct. 747, 756 (46 L. Ed. 1058), it was broadly said that the Sherman Anti-Trust Act—

"does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."

What was there said related to a provision in a royalty contract given by the owner of a patent for the manufacture and sale of the patented articles, with a restriction forbid-

ding "any rebate or reduction from the price or prices fixed in the license."

In *Henry* v. *Dick Co.*, 224 U. S. 1, 23, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, and following, it was held that, while an absolute and unconditional sale operates to pass the patented article outside of the protection of the patent, a patentee may by a conditional sale so "restrict the use of his vendee within specific boundaries of time or place or method" as to make prohibited sales outside of those boundaries constitute infringement. The subject of sale in the Dick case was a mimeograph sold "with the license restriction that it may **[729]** be used only with the stencil, paper, ink, and other supplies made by" the vendor; and contributory infringement was found in a direct sale to the purchaser of a mimeograph of a kind of ink suitable for use with the machine, with full knowledge by the seller of the restriction, and with the expectation that the ink sold would be used in connection with the machine.

In *Bauer* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, it was held that, where the transfer of a patented article is full and complete, an attempt to reserve the right to fix the price at which it shall be resold by the vendee is futile. This rule was applied to the sale of a package of Sanatogen, bearing a notice that the package was licensed—

"for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent * * * under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages. A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation."

The Dick case was distinguished (229 U. S. 15, 33 Sup. Ct. 619 [57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150]) by the consideration that in the latter case merely a qualified title was passed to the purchaser, "giving a right to use the machine only with certain specified supplies," while in the Sanatogen case the absolute title passed.

Opinion of the Court.

It is clear that the jobbers in the instant case were not merely the agents, but were the vendees, of the manufacturer: and the case as to the jobbers is therefore not within decisions, such as *Virtue* v. *Creamery Package Co.*, 277 U. S. 37, 33 Sup. Ct. 202, 57 L. Ed. 393, which holds that the contract by which the manufacturers of a patented article appoints another, who does not manufacture or sell like articles, his exclusive agent for the output of the factory, does not violate the Sherman Act; nor within cases like *Locker* v. *American Tobacco Co.* (C. C. A. 2), 218 Fed. 447, 134 C. C. A. 247, which holds that an agreement whereby a manufacturer made a certain jobber its sole agent in certain territory, on condition that it should not sell the manufacturer's product at more than list prices, did not violate the Federal Anti-Trust Law. Nor do the facts present a case for the application of the rule (illustrated by *Paper Bag Patent case*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, and *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689), that defendants are not required to sell to anyone they do not wish.

It is also clear, in our opinion, that the sales by defendants in the instant case were not conditional, as held to be the case in *Henry* v. *Dick*, but absolute, within the rule in *Bauer* v. *O'Donnell.* Nor are they brought within *Bement* v. *National Harrow Co.*, *supra.* Whether the value of the carton is negligible as compared with the value of the contents of the package, and its purchase a mere incident in the contract of sale, or whether, as urged by defendants, the carton has itself a substantial value, is not controlling of the ultimate merits; for its use can surely give no greater right than if it were the only article sold, as [730] in the Sanatogen case, nor was it sold for use with subsequent purchases of the food. Defendants were thus given by the patent no warrant to impose upon either jobbers or retailers restrictions limiting the resale price of the product after an absolute sale had once been had by defendants.

We find in *United States* v. *Keystone Watch Case Co.* (D. C.) 218 Fed. 502 (recently decided by the Circuit Judges of the Third Circuit), nothing conflicting with this view as respects restrictions upon jobbers; for we assume, as we

must, that the case there considered was thought to fall within *Bement* v. *National Harrow Co.* and *Henry* v. *Dick*, rather than within *Bauer* v. *O'Donnell*. The Keystone case is express authority for the invalidity of the plan as respects restrictions upon retailers. Nor is there in *United States* v. *United Shoe Machinery Co.*, 222 Fed. 349 (recently decided by the judges sitting in the District Court of Massachusetts), anything opposed to the conclusion we have reached in the instant case. The Shoe machinery case relates wholly to restrictions under leases of patented machines, and thus in no way to absolute sales of patented articles.

Obviously the California decree (*Kellogg Toasted Corn Flake Co.* v. *Weinstein Co.*, no opinion), in no way, as against the United States, amounts to an adjudication of the validity of defendants' selling plan under the Anti-Trust Act.

It should be unnecessary to add that we see nothing in the prayer of the petition contravening section 2 of the Clayton Act, which forbids discrimination in price on the part of one engaged in interstate commerce; nor that it is immaterial that defendants' selling plan is open to its competitors, or that no attempt to corner the market is shown.

[2] It results from these views that the motion to strike out the paragraph of the petition we have identified as (*b*) must be denied. As to the paragraph referred to as (*c*), the motion to strike should likewise be denied; for, while a resort to the cartons as a subterfuge to evade the Anti-Trust Act is not essential to a lack of protection under the patent, the fact of such resort may have some relation to the alleged fact of combination. In any event, it is not so clearly irrelevant as to justify its elimination. It seems entirely clear that defendants' selling plan here in question goes beyond any protection afforded by the patent on the carton, and is in its essential principles violative of the Sherman Act.

[3] But defendants urge that no contract in restraint of trade is consummated, because the notice on the carton does not constitute a valid contract, although counsel say it was believed by the company that such would be its effect when it was put on the package. Defendants invoke *Bobbs-*

Opinion of the Court.

Merrill Co. v. *Straus*, 210 U. S. 339, 350, 28 Sup. Ct. 722, 52 L. Ed. 1086, which holds that the notice printed on the title page of the copyrighted book (to the effect that no dealer is licensed to sell it for less than $1 and that "a sale at a less price will be treated as an infringement of the copyright") was ineffective to secure to the owner of the copyright the protection sought. And it is said that *Bauer* v. *O'Donnell*, 229 U. S. at page 16, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 **[731]** L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, holds that the contract there in question could not be enforced or accomplished by notice. But we see nothing in either of these cases lending color to the proposition that a legally effective and enforceable contract in restraint of trade is necessary to a violation of the Sherman Act. *Bobbs-Merrill Co.* v. *Straus* and *Bauer* v. *O'Donnell* were infringement suits—the one under a copyright, and the other under a patent. The primary question involved in each case was whether complainant's exclusive right to sell, once exercised, continued after the sale to the extent of controlling prices on resale. The pith of the decisions, as distinguishing absolute sales from qualified sales or license agreements, is contained in the sentence (in the Bobbs-Merrill case, at page 350 of 210 U. S., at page 726 of 28 Sup. Ct. [52 L. Ed. 1086]), "There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book," and (in *Bauer* v. *O'Donnell*, at page 16 of 229 U. S., at page 619 of 33 Sup. Ct. [57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150]), "There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words."

A legally enforceable contract or system of contracts is not required in order to render obnoxious to the Anti-Trust Act a selling plan which unreasonably restrains or monopolizes trade or commerce. The Sherman Act is not aimed alone at contracts, but embraces combination schemes of any and every kind which amount to an undue or unreasonable restraint of trade in interstate commerce, "without regard to the garb in which the acts were

not afford escape. *American Tobacco Co. case*, 221 U. S. 180, 181, 31 Sup. Ct. 632, 55 L. Ed. 663; *Standard Oil case*, 221 U. S. at page 59, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. at page 49, 33 Sup. Ct. 9, 57 L. Ed. 107; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 85, 33 Sup. Ct. 53, 57 L. Ed. 124; *United States* v. *Great Lakes Towing Co.* (D. C.) 208 Fed. 733, 741.

The petition charges that restraint and monopoly are actually effected. When it is once established that the monopoly of the patent does not continue after the right of sale has once been exercised, the case is to be considered as if there were no patent; and, so considered, the case falls directly within cases such as the Miles Medical Co. and the Park cases, and others cited in this opinion.

[4] The motion to strike out the paragraph of the petition which, as summarized, we have referred to as (*a*) must be denied. The prior plan may properly be considered as elucidating the effect and intent of the later plan. *United States* v. *L. S. & M. S. Ry. Co.* (D. C.), 203 Fed. 295, 307. We cannot say that the matter sought to be introduced into the petition by way of amendment may not be germane to the ultimate controversy.

It follows, from the views we have expressed, that the entire motion to strike out, as well as the motion to dismiss, presented by defendants, should be denied, and petitioner's motion to amend the bill granted. An order will accordingly be so made.

Syllabus.

GREAT ATLANTIC & PACIFIC TEA CO *v.* CREAM OF WHEAT CO.[a]

(District Court, S. D. New York. July 20, 1915.)

[224 Fed. Rep., 566.]

MONOPOLIES 17—"RESTRAINT OF TRADE"—INJUNCTION.—The refusal of the manufacturer of an unpatented food product, which is not a necessity of life or even a staple article of trade, who has a monopoly only because of the trade-name under which it is sold, it being open to anyone else to make and sell the same article under any other name which does not infringe such trade-name, to sell to a dealer who resells at retail at less than the regular price charged by other retailers, and a price which gives to the retailer no profit, while to an extent it lessens competition, is not an unreasonable "restraint of trade," nor is it unlawful under the Clayton Act (act Oct. 15, 1914, c. 323, § 2, 38 Stat. 730) as a price discrimination, the effect of which "may be to substantially lessen competition or tend to create a monopoly," so as to entitle the would-be purchaser to relief by injunction under section 16 of the act; but, on the contrary, the effect of such an injunction would be to restrain trade by making it impossible for competitors to handle the article, except at a loss, and to give such purchaser a monoply.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

[567] MONOPOLIES 17—INTERSTATE-COMMERCE LAW—CONSTRUCTION OF CLAYTON ACT.—Construing together the provisions of section 2 of the Clayton Act the last proviso in effect authorizes persons engaged in selling goods in interstate commerce to select their own bona fide customers, provided the effect of such selection is not to substantially and unreasonably restrain trade; and the refusal of a manufacturer to sell its product to a dealer, who avowedly uses it in a manner which injures and lessens the trade of the maker, cannot be said to be an unreasonable restraint of trade, nor a violation of the statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

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[a] For opinion of Circuit Court of Appeals (227 Fed., 46), see *post*, page 873.

MONOPOLIES 24—INTERSTATE COMMERCE—STATUTORY REGULATION.—Congress is without constitutional power to authorize the courts by injunction to compel a person, selling goods in interstate commerce, and affected by no public duty, to sell his goods to a particular customer.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

MONOPOLIES 17—INTERFERENCE WITH COMMERCE—INJUNCTION.—The sending out by a manufacturer of circulars to wholesale dealers, who are its customers, requesting them not to sell its product to a particular dealer, on the ground that he is cutting retail prices, is within its legal rights and cannot be enjoined.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

WORDS AND PHRASES—"MANUFACTURING."—"Manufacturing" is a word of such wide and loose meaning as to include the preparation by art of any finished product from raw material.

WORDS AND PHRASES—"MIDDLINGS."—"Middlings" are the coarse flour and fine bran separated by bolting from fine flour and coarse bran.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Middlings.]

In equity. Suit by the Great Atlantic & Pacific Tea Company against the Cream of Wheat Company. On motion for preliminary injunction. Denied.

Martin Conboy, of New York City, for the motion.

Jos. J. Baker, of New York City, and *Rome G. Brown*, of Minneapolis, Minn., opposed.

HOUGH, District Judge.

Although the application is for relief pendente lite only, all the essential facts are set forth with clearness and without contradiction upon any material point. The novelty of the litigation is such that a careful statement of what these facts are is more than excusable, for upon them will depend conclusions of law toward whose final settlement the action of this court is but a preliminary.

Plaintiff is a corporation of New Jersey, defendant of North Dakota, and has appeared herein protesting against the jurisdiction. This point has been resolved against de-

fendant in other proceedings and by another judge. Following that decision, and without expressing any opinion thereupon, it is held, for the sake of the record, that jurisdic-
[568] tion exists, and that defendant was lawfully obliged to respond to process.

[5] The business of defendant is what is commonly called the "manufacture" and sale of the food product known as "Cream of Wheat." "Manufacturing" is a word of such wide and loose meaning as to include the preparation by art of any finished product from raw material; but more accurately descriptive words for defendant's business are selection and cleansing of the by-product of a true manufacture, viz, flour making.

[6] "Middlings" are the coarse flour and fine bran separated by bolting from fine flour and coarse bran. These middlings defendant "selects," selection depending upon the grade and kind of wheat used by the miller, and then purifies or cleanses such selection. The result is Cream of Wheat, which is no more than purified middlings. It is not patented, any one can make it who can get middlings, and the amount of that material annually required by the business of defendant is less than 1 per cent of the amount thereof produced in the same period by the millers of the United States.

Obviously defendant does not and cannot control, nor indeed does it seek to control or monopolize, the production of, or market for, middlings. It naturally wishes to buy its raw material wherever it can procure the same easiest, best, and cheapest. Yet it has a monopoly—a perfectly lawful monopoly—in the trade name "Cream of Wheat." By the law of trade-mark and unfair competition, no one but defendant can sell, under the name chosen by defendant, what any one can make and sell under another and non-infringing label. The style and dress, name, and package of defendant have been extensively and successfully advertised for 18 years, until the public has grown accustomed to ask for and get something good to eat under the name "Cream of Wheat"; and an identical substance under another name would have to travel the same long, ha-

ardous, and expensive path in order to get or create a market.

It is possible to assert that the (say) 1 per cent of middlings, which, when selected and purified, is called Cream of Wheat, is for legal purposes, at all events, a different commodity, a separate thing or entity, from all other middlings. The point is mere dialectic, for all that makes the difference or separates the things is a name, and the substantial truth remains that defendant's business consists in lawfully monopolizing a trade-name, and impressing the public with the purity, reliability, and uniformity of the very common substance it sells under that cleverly chosen name. The selection of the name was quite as important as the selection of the middlings, when business began, and, after so much advertising, the name or brand is by long odds the most important element in the business.

Plaintiff is the founder and proprietor of an unusually large number of stores widely scattered through the Middle and some of the Eastern States. If not grocery stores in the common acceptance of that phrase, they sell many, if not most, "groceries." Out of more than 1,000 establishments owned by plaintiff, a large proportion are known as "Economy Stores," which are places having but a single attendant and [569] no telephone, giving no credit, making no deliveries, and closed whenever the manager leaves for meals or sleep. The maintenance charge, or overhead expense, of such stores is plainly smaller than that of groceries managed in the usual way; and at them plaintiff seeks to compensate for lack of conveniences by cheapness of price. Such a storekeeper as plaintiff obviously has under his own hand as many outlets or places for reaching the consumer as some jobbers or wholesalers have customers. He can buy for his own convenience, and in order to sell over his own counters, in quantities as large as does many a jobber who would refuse retail trade. In short, the plaintiff is in buying a wholesaler (on perhaps no great scale), and in selling is a very large retailer.

For purposes of this discussion, relations between plaintiff and defendant begin in 1913. In January of that

year defendant published a new scheme of sales, revoking all existing plans, methods, or agreements. The action was timely, if not caused by legal advice based on the price regulation cases, of which the dissent in *Henry* v. *Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, was the premonitory rumble, and *Victor Talking Machine Co.* v. *Straus* (D. C.), 222 Fed. 524, is the last echo.[a]

By the printed scheme just mentioned the Cream of Wheat Company held itself out as refusing to sell to "consumers, retailers, or chain, or department stores." It reserved the right to refuse to sell to anybody who failed to comply with any request made, and deemed by defendant beneficial to itself, the "trade at large," or the "interests of the consumer," and announced as its policy that it would "confine our sales exclusively to wholesalers." Sales, however, once made, were absolute, and the transaction closed. Sale was to imply no agreement to maintain or fix any price on a resale; nevertheless defendant *requested* that retail prices be kept at the level recommended by it.

This request, taken in conjunction with the reserved right to cease selling to anyone who did not comply with requests from the same source, was in effect saying plainly enough: Keep up the retail price, or we will stop supplying you, if we think such stoppage profitable. I do not suppose that this sales scheme was a contract, or anything enforceable against defendant; but it serves to show a professed state of mind.

Notwithstanding, however, this published sales plan, defendant, well knowing that plaintiff sold directly to the consumer, sold Cream of Wheat to plaintiff at wholesale rates and in large quantities, upon condition that, in making sales over the counter, no smaller price should be charged than the small retailer had to ask in order to get a fair profit,

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[a] These cases resting on sales of patented articles are cited, merely to emphasize my opinion that restrictions in use and limitations on sale are essentially the same thing, if title passes to the *thing* limited or restricted. The dissent in the Henry case loudly prophesied to rofession what has since become history.

viz, not less than 14 cents the package.[a] In or about January, 1915, [570] plaintiff refused to observe this agreement or request, and openly sold Cream of Wheat at its "Economy Stores" for 12 cents per package.

It is fairly inferable from this history that the published sale plan of 1913 was incomplete or inaccurate. It should have added:

"We reserve the right to sell at wholesale rates and in car load lots to *anybody* who will not cut the consumer's price below 14 cents."

Defendant's selection, acceptance, or rejection of a customer did not depend upon the wholesale or retail character of his business, but largely, if not wholly, upon whether he could be depended on to maintain "requested" rates. After some talk and writing, plaintiff remained contumacious, and refused to maintain prices, whereupon defendant refused and still refuses to sell Cream of Wheat to plaintiff at any price or in any quantity whatever. The defendant also sent out circulars to the jobbing trade pointing out the "cut rate" practices of plaintiff, and asking the recipients to see to it "that no quantity [of Cream of Wheat] at any price shall reach directly or indirectly the [plaintiffs] to enable them to continue their present menace to the legitimate trade."

In result, the situation when suit was brought was that plaintiff could not make any money on Cream of Wheat sold at 12 cents, because it could not get carload rates; but no great success attended defendant's efforts to prevent jobbers selling to plaintiff. There were and are too many men quite willing to let the Atlantic & Pacific Company lose some money, as long as they made a little. This condition of affairs still continues, and the main object of this action and of the present application is to compel defendant

[a] The effect of defendant's price list was and is this: The Cream of Wheat Company sold to wholesalers at $4.10 per case of 36 packages, and in car load lots at $3.95 per case. The wholesaler was "*requested*" to sell to the retailer at $4.50 per case, a figure which enables the ordinary groceryman to get a moderate profit on selling at 14 cents the package. At 12 cents per package, loss is almost certain, unless the goods are obtained at $3.95 the case.

to fill plaintiff's orders for Cream of Wheat in carload lots at $3.95 per case. Of course the bill does not put the matter so badly,[a] but if the law does not warrant an order productive of the result stated this action is of little worth.

It is not worth while to consider whether the facts above shown produce a case under the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209). If they do, the matter is not much advanced, because under that statute the plaintiff could not bring this action in equity; and, if [571] they do not, plaintiff just as firmly asserts its right to relief under the Clayton Act (act Oct. 15, 1914, c. 323, 38 Stat. 730). I shall therefore follow counsel (none of whom has discussed the applicability of the Sherman Act) and say no more about it.

[1] It is urged that defendant's professed and published scheme of sales, plus its practice thereunder, create an actual monopoly of, and do lessen competition in, Cream of Wheat; that this result is in itself unlawful, and is produced by means which are specifically prohibited by section 2 of the Clayton Act, viz, price discriminations not justified by any of the exceptions of that section. As the next and final step in justification of its procedure, plaintiff asserts itself to be threatened with loss or damage through the above-stated violations of section 2, and therefore seeks an injunction under

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[a] The prayers of the bill are as follows:

"1. That it be adjudged that the said plan or system of sales and said system of embargo are illegal, and that the defendant herein has violated sections 1 and 2 of the act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' [Comp. St. 1913, §§ 8820, 8821], and section 2 of the act of Congress of October 15, 1914, entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.'

"2. That defendant be enjoined and prohibited from enforcing and carrying *out said plan or system of sales*, or from enforcing or attempting to enforce said embargo by means of said boycotting, blacklisting, or otherwise, *and from thereby* in any manner or to any extent *cutting off the plaintiff's supply of said article 'Cream of Wheat'* within the jurisdiction of the United States until such time as your honors shall appoint and direct and order herein, and that upon such hearing the writ herein prayed for be made and confirmed until the final determination of this suit, and that thereupon said injunction may be made perpetual."

section 16. The text of these sections is given in a footnote,[a] and I shall hereafter assume (but not find) that, if defendant has violated section 2, plaintiff has good right to use section 16.

It will show my interpretation of section 2, and emphasize any errors of construction, to pick out, sometimes paraphrase, and arrange in order the words of that section

[a] Section 2. "It shall be *unlawful for any person engaged in commerce, in the course of such commerce,* either directly or indirectly to *discriminate* in price *between different purchasers of commodities,* which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce:* Provided, that *nothing* herein contained *shall prevent discrimination* in price between purchasers of commodities on account of differences *in* the grade, quality, or *quantity* of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, that *nothing* herein contained *shall prevent persons engaged in selling goods,* wares, or merchandise in commerce from *selecting their own customers in bona fide transactions and not in restraint of trade.*"

Section 16. "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven, and eight of this act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

deemed applicable to the case in hand, thus: It is unlawful for a person engaged in commerce,[a] and in the course of commerce, to discriminate in price between purchasers of [572] commodities,[b] whenever discrimination may substantially lessen competition, or tend to create a monopoly in any line of commerce;[c] but there may be price discrimination on account of quantity of commodity sold, and persons selling goods may still select their own customers in bona fide transactions,[d] and not in restraint of trade.

Plaintiff's syllogisms in support of the demand for relief are simple, thus: (1) Defendant has a monopoly in Cream of Wheat; (2) through such monopoly it fixes the resale price of that article; therefore (3) it prevents competition in Cream of Wheat and violates the body of section 2. Again: (1) Preventing competition is restraint of trade; (2) defendant does prevent competition; therefore (3) it restrains trade and is not within the exception of section 2. If the premises of the above logical formulæ are admitted in the sense and to the extent plaintiff asserts or assumes as proper, the conclusions flow as matter of course. A successful answer must deny or avoid the premises, or ascribe to words a scope and meaning at variance with plaintiff's usage.

Taking up seriatim the parts of the above propositions: It is true that defendant has a monopoly in Cream of Wheat; but, as heretofore stated, it is a lawful monopoly, ultimately resting on the plain truth that there can be nothing anywhere in the United States lawfully called Cream of Wheat without defendant's consent and approbation. In that substance (if legally it is a distinct substance)

[a] Commerce can only mean (as the context shows) interstate or foreign commerce.

[b] That is, "commodities" sold by the "person" first named.

[c] "Line of commerce." This vulgarism is not a term of art, but it must mean trading or dealing in the commodities (or some of them) first above spoken of.

[d] It would have been simpler to say that vendors may select their own bona fide customers. I think the intent is to exclude from the exception pretended sales, e. g., consignments to undisclosed agents, and perhaps sales coupled with an attempted condition subsequent.

defendant has the monopoly of a creator, something which is not and never has been within the prohibition of any law, anti-trust or otherwise. On the contrary, that monopoly is encouraged by patent, trade-mark, and copyright statutes, and the rules of unfair competition. Therefore the implication of plaintiff's premise, that there is something inherently wrong in defendant's monopoly, is false and misleading.

The minor premise, that defendant *fixes* the resale price, is not, in my opinion, true in point of fact. It would like to fix that price, so far as its minimum is concerned; but *fixing* connotes enforcement. That it cannot accomplish, and since 1913, at all events, the attempt has been abandoned. Let it be assumed that defendant declines business with all who refuse to maintain prices. If such refusal affected a necessity of life, or even a staple article of trade, the matter might be serious, and history might be appealed to for instances of statutory punishment—e. g., the engrossing acts. But mere abstention from dealing cannot per se be price fixing, because the price is not made to depend upon any contract or agreement even thought by the parties to be enforceable. To call defendant's acts price fixing is inaccurate, and evades obvious legal questions, viz., whether defendant has the right to decline business, and whether it is anybody's business why the business is declined.

[573] Therefore, because I cannot accept the meaning imputed to the words used by plaintiff, it is not found necessary to reach the conclusion of the first proposition.

Concerning the second syllogism: It must be admitted that there is abundant authority for the general proposition that preventing competition is restraint of trade; but it does not follow that it is unlawful either to prevent any and every species of competition or to restrain trade in any and every degree. The only competition prevented or sought to be prevented by defendant's acts is that of Cream of Wheat against itself; the only trade restrained is the commercial warfare of a large buyer against small ones, or that of a merchant who, for advertising purposes, may sell an article at a loss, in order to get customers at his shop, and then per-

suade them to buy other things at a compensating profit. That competition, as encouraged by statutes and decisions, does not include such practices, has been sufficiently shown (with ample citations) in *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522.

It is further obvious that, when plaintiff premises that preventing competition is restraining trade, it is assumed that the resultant restraint is *unreasonable;* for there is nothing in the Clayton Act to compel or induce courts to hold that the trade restraint referred to by this statute differs in kind, quality, or degree from that now held to be meant by the Sherman Act.

Because, therefore, I am not persuaded that the acts of defendant have produced, or tend to produce, diminution of any competition favored by reason or law, or have restrained trade unreasonably (if at all) I do not find it necessary to accede to the second syllogism.

Mere doubt of the propositions of plaintiff would require refusal of preliminary injunction; but I may more distinctly state my reasons for thinking that even definite, positive, and admitted price regulation is not unreasonable restraint of trade in the present instance.[6]

Cream of Wheat is not a necessity; it is not even a staple article of commerce. If it be a commodity at all, the commodity and the name are synonymous. Its continued ex-

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[6] There is surely a very obvious difference between enforcing by legal process an agreement to regulate prices and regulating prices by legal process. The agreement may be, and usually is, unenforceable. *Bauer* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, gives the reasons. But it is not necessarily unlawful for a man to do voluntarily what he cannot be compelled to do. It follows, therefore, that even under the Clayton Act price regulation accomplished without undue or unreasonable trade restraint, and by a judicious selection of customers, may be lawful. It *seems* to be argued for plaintiff that, because defendant could not enforce a price agreement, it cannot by any method accomplish, even partially, the same result. It is an amusing commentary on this doctrine that the main object of this suit is to have this court *compel* delivery of Cream of Wheat at $3.95 per case, which is pro tanto price fixing.

istence depends upon defendant's ability to control the marketing of its own product. The doing of what plaintiff wishes would take from every groceryman near an "Economy Store" the last incentive to buy any Cream of Wheat, and collectively such grocery keepers are more important to the public and the defendant than is the plaintiff. If injunction were granted, [574] defendant and many retailers would be injured, and the microscopic benefit to a small portion of the public would last only until plaintiff was relieved from the competition of the 14-cent grocers, when it, too, would charge what the business would normally and naturally bear. In short, it is plaintiff, and not defendant, that pursues methods whose hardship and injustice have often been judicially commented upon. *U. S.* v. *Freight Assocn.*, 166 U. S. 321, 17 Sup. Ct. 540, 41 L. Ed. 1007.

In my judgment the prevention or limitation of practices such as plaintiff's (so far as consistent with statute law) is the reverse of unreasonable.

There remain two legal inquiries (previously suggested) to which this motion justifies answers, which answers go to the root of plaintiff's case. The questions are: (1) Does section 2 of the Clayton Act apply to the defendant at all? and (2) Is it within the power of Congress to compel defendant to do what plaintiff demands?

[2] Section 2 plainly identifies the lessening of competition with restraint of trade. (Cf. the body of the section with the last exception.) But price discrimination is only forbidden when it "substantially" lessens competition. Construing the whole section together, the last exception reads in effect that a "vendor may select his own bona fide customers providing the effect of such selection is not to *substantially* and *unreasonably* restrain trade." How it can be called substantial and unreasonable restraint of trade to refuse to deal with a man who avowedly is to use his dealing to injure the vendor, when said vendor makes and sells only such an advertisement-begotten article as Cream of Wheat, whose fancy name needs the nursing of carefully handled sales to maintain an output of trifling moment in the food market, is beyond my comprehension.

Opinion of the Court.

[3] Turning to the second question: If it be granted that section 2 does apply, and that defendant's selection of customers results in unlawful restraint of trade, can it be possible that such person's evil ways are to be amended, not by stopping his business, but by adding to his list of customers one or many persons chosen by Congress? Numerous individuals and corporations have been enjoined from restraining the trade of other people, no matter how flourishing the offenders' trade might be, nor how greatly the general volume of trade had increased during the period of restraint. But never before has it been urged that, if J. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason, such conduct gave Roe a cause of action.[a] If Congress has sought to give him one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property.

[575] Using the word "sell" or "sale" conceals the issue. If a man prefers to keep what he has, an offer of money to salve the taking thereof does not prevent such taking from being confiscation. The Cream of Wheat Company is a purely private concern, except as regulated by its creating law. It is an ordinary merchant, whose business is affected by no public use whatever. The statute as construed by plaintiff descends upon that private merchant, and commands him to make a contract by which he transfers his property for a price, but against his will. The contract and the price are legally mere surplusage; the constitutional violation lies in the compulsion, whereby he is deprived of his property for a private purpose. If defendant's actual scheme of interstate business is unlawful, the United States certainly, and now, perhaps, an individual plaintiff, can put it out of business; but neither the Nation nor any individual can

[a] The following decisions recognize the inherent right of refusing business, but bear no relation to the facts herein: In *re Grice* (C. C.), 79 Fed. 627; *Greater New York, etc., Co.* v. *Biograph Co.*, 203 Fed. 39, 121 C. C. A. 375; *Adair* v. *United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; *Standard Oil Co.* v. *United States*, 221 U. S. 56, 31 Sup. [illegible], 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

take away its property, with or without compensation, for the private use of anyone.[a]

[4] There remains one pendant to the main case. Plaintiff complains of defendant's circulars to the trade as an embargo or boycott. There is no proof that defendant refused or threatened to refuse to sell to anyone who sold to plaintiff; it did request its chosen customers not to deal with plaintiff.

If it had good right to refuse dealings itself with plaintiff, and without malice asked other people to do the same thing, so far only as Cream of Wheat was concerned, defendant was within its rights. "Embargo" is a word without meaning in private law. As to "boycott," I have stated my views at some length in *Gill Engraving Co.* v. *Doerr* (D. C.) 214 Fed. 111. Limiting the discussion to goods of defendant's own making, the opinion in *U. S.* v. *Keystone Watch Co.* (D. C.) 218 Fed. 502, does not bear out plaintiff's contention. See, also, *Montgomery Ward & Co.* v. *South Dakota, etc., Co.* (C. C.) 150 Fed. 413.

The motion is denied in all its parts.

NOTE.—Aided by counsel, I have examined all the public documents I could find relative to the Clayton Act, hoping to find something of assistance in interpreting the statute. The point raised by this motion was not, so far as I know, discussed or considered.

GREAT ATLANTIC & PACIFIC TEA CO *v.* CREAM OF WHEAT CO.[b]

(Circuit Court of Appeals, Second Circuit. November 10, 1915.)

[227 Fed. Rep., 46.]

WORDS AND PHRASES—"WHOLESALER"—"JOBBER"—"RETAILER."—A "wholesaler" is one who buys in comparatively large quantities, and who sells usually in smaller quantities, but never to the ulti-

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[a] It is an interesting speculation whether national price regulation, embracing compulsory sales, could not be reached by a system of Fed-[illegible]enses as a prerequisite for interstate business. Semble that [illegible] to such prospective regulatory orders might be exacted as [illegible] license.

[b] [illegible]n of the District Court (224 Fed. 566), see ante, page 860.

Statement of the Case.

mate consumer of an individual unit. He sells either to a "jobber," a sort of middleman, or to a "retailer," who sells to the consumer. The quantities bought by the wholesaler may vary from a fraction of a car load to many car loads; it being the character, not of his buying, but of his selling, that marks him as a wholesaler.*

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jobber; Retail Dealer; Wholesale Dealer.]

MONOPOLIES 17—DISCRIMINATION—STATUTORY PROVISIONS.—Defendant was engaged in selling under a trade name purified wheat middlings selected by it and put up in packages. Its whole business covered less than 1 per cent of the total middlings bought and sold in the country. It decided to sell only to wholesalers, and so announced to the trade, but for a time made an exception as to a particular retailer. It afterwards decided that it would no longer sell to such retailer, and did not thereafter sell to him. *Held*, that this was not unlawful, and such retailer was not entitled to an injunction restraining defendant from refusing to sell its goods to it, and it was wholly immaterial why it ceased to sell to such retailer, as neither the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209) nor the Clayton Act (act Oct. 15, 1914, c. 323, 38 Stat. 730) has changed the rule that a trader may reject the offer of a proposing buyer for any reason that appeals to him, whether it be because he does not like the buyer's business methods, or because of some personal difference.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an order refusing to grant an injunction restraining defendant from refusing to sell its goods to [47] complainant. The facts are quite fully set forth in the opinion of Judge Hough, which is reported in 224 Fed. 566.

Griggs, Baldwin & Baldwin, of New York City (*Martin Conboy*, *Joseph F. Collins*, and *Frank A. Clary*, of New York City, of counsel), for appellant.

Joseph J. Baker, of New York City (*Rome G. Brown*, of Minneapolis, Minn., of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge.

Briefly summarized, the facts are these: In the production of wheat flour from wheat there is a sort of by-product known as "purified middlings." It is produced by every flouring mill in the United States engaged in the manufacture of wheat flour. It is a staple commodity regularly quoted and dealt in in all grain markets. Defendant buys "purified middlings," selecting such as it thinks grade high in quality. Without submitting them to any process or treatment, without adding anything to them, it puts up the middlings which it selects in packages and offers its selection to the trade under the name "Cream of Wheat." That name identifies packages containing middlings of defendant's selection, and it has protected its trade name for such selection by a copyright covering the carton in which the cereal is packed. Either because it has used good judgment in its selection, or because it has well advertised its trademark, it finds a ready market for its packages. Its particular selection, however, amounts to less than 1 per cent of the total purified middlings bought and sold in this country.

With an exception which will be referred to later, defendant makes no sales to consumers or to retailers, but confines its sales exclusively to wholesalers, to whom it charges two prices, $3.95 per case in car-load lots and $4.10 per case in less than car-load lots. To each purchaser from it, it sends a circular requesting such purchaser to sell to the retail trade only at a price of $4.50 per case, adding to this request the statement that it does not intend to waive the right to refuse at any time to supply any dealer who shall fail to comply with any request made by it, the infringement of which defendant may deem prejudicial to the interests of the consumer, to defendant's own business, or to the trade at large. Complainant contends that defendant's course of conduct is a violation of the Sherman Anti-Trust Act and that under the recent Clayton Act this suit may be instituted and maintained by complainant.

That branch of the case has been most elaborately argued. It was discussed by the district judge. We do not find it necessary to go into it, as we are satisfied that complainant is not entitled to the relief now asked for.

Opinion of the Court.

[1] As was stated before, defendant has elected not to sell to consumers or retailers, but to confine its sales exclusively to wholesalers. There is nothing unusual about such a course of business, and certainly it is no offense against common law, statutes, public policy, or good morals for a trader to confine his sales to persons who will buy from him in large quantities. A "wholesaler" is one who buys in compara[48]tively large quantities and who sells, usually in smaller quantities, but never to the ultimate consumer of an individual unit. He sells either to a "jobber" (a sort of middleman) or to a "retailer"; the latter being the one who sells to the consumer. The "large" quantities bought by the wholesaler may vary greatly—from a fraction of a car-load to many car-loads; the character, not of his buying, but of his selling, marks him as a wholesaler. If occasionally, in some particular business, this term loses somewhat of its original significance, such manifestly, as the record shows, is not the fact with the business now under consideration.

Upon the proof and the admissions in the record, this complainant is not a wholesaler, but a retailer; it does not confine its sales to retailers, but sells to countless consumers—a package at a time for 12 cents.

[2] Defendant, as we have seen, in the conduct of its business, decided and made announcement to the trade that for reasons sufficient to itself it would sell only to wholesalers. Why, if it chose to do so, it could not make such a rule and adhere to it, we are at a loss to understand. It named the prices at which it would sell to wholesalers, so much in car-load lots, so much in less than car-load lots. That certainly it had a right to do; the Clayton Act itself expressly recognizes the existence of this right. Under the rule which defendant had legitimately established for the conduct of its own business, complainant could not buy from it, because complainant was a retailer. Nevertheless, for a time, defendant made an exception to its rule, and sold to complainant, under some arrangement, which, as defendant thought, would not make the wholesalers with whom it dealt [illegible] the exception. On a certain day defendant de- [illegible] would no longer sell to this retailer at all, and

Opinion of the Court.

since then it has not sold to complainant. There was no contract between the two which bound defendant to sell to complainant for any specified period of time. This suit is really brought to force defendant to continue to sell to this single retailer, as it sells to the wholesalers who trade with it.

Much has been said about the reason why defendant ceased to treat complainant as an exception to its rule; failure of the latter to live up to some arrangement, etc. All that seems to be wholly immaterial. The business of defendant is not a monopoly, or even a quasi monopoly. Really it is selling purified wheat middlings and its whole business covers only about 1 per cent of that product. It makes its own selection of what by-products of the milling process it will put up, and sells what it puts up under marks which tell the purchaser that these middlings are its own selection. It is open to Brown, Jones, and Robinson to make their selections out of the other 99 per cent of purified middlings and put them up and sell them; possibly one or more of them may prove to be better selectors than defendant, or may pursuade the public that they are. It is difficult to see how into such a business as that any novel and exceptional rule of law is to be imported. We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and this his selection of seller and buyer was wholly his own concern. "It is a [49] part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice." Cooley on Torts, p. 278. See also our own opinion in *Greater New York Film Co.* v. *Biograph* Co., 203 Fed. 39, 121 C. C. A. 375.

Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act,

has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the Government.

The order is affirmed.

KANSAS CITY SOUTHERN RY. CO. v. LUSK ET AL.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1915.)

[224 Fed. Rep., 704.]

APPEAL AND ERROR 919—PRESUMPTIONS—PLEADING—MOTIONS TO STRIKE—EFFECT.—Where paragraphs presenting a defense were on motion stricken from the answer, whatever facts contained therein were well pleaded must on appeal be taken as true.*

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3713; Dec. Dig. 919.]

RAILROADS 208—RECEIVERS—CONTRACTS—RENUNCIATION.—The receivers of an insolvent railroad company applied for leave to disaffirm and renounce a contract whereby the corporation had leased terminal facilities from the appellant, on the ground that the contract was burdensome to the company; it having acquired its own terminal facilities for those places. The contract was one not binding on the receivers until assumed under direction of the court. The insolvent company had acquired its own terminal facilities some 14 years before the application. *Held* that, as the matter was one of business expediency, the court would not investigate, on the ground that the receivers did not come into court with clean hands, the question whether the property was acquired in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 685–691; Dec. Dig. 208.]

MONOPOLIES 16—ANTI-TRUST LAWS—VIOLATION.—Where a railroad system becomes insolvent, the court does not, by taking possession of the property through its receiver and operating it, violate the anti-trust laws of the State or Federal Government, though the insolvent corporation acquired some of its mileage in violation of such laws.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. 16.]

APPEAL AND ERROR 101—DECISIONS APPEALABLE—ORDERS.—An order a receiver of an insolvent railroad corporation was author-

ized to renounce a contract for the renting of terminal facilities is appealable; the decision being final in its nature, in view of the fact that such contract was practically ended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 681-687; Dec. Dig. 101.]

Appeal from the District Court of the United States for the Eastern District of Missouri; Walter H. Sanborn, Judge.

Application by James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company, to disaffirm and renounce a contract with the Kansas City Southern Railway Company. From an order granting the application, the Railway Company appeals. Affirmed.

[705] *F. H. Moore*, of Kansas City, Mo. (*Samuel W. Moore*, of Kansas City, Mo., on the brief), for appellant.

Edward T. Miller, of St. Louis, Mo. (*W. F. Evans*, of St. Louis, Mo., on the brief), for appellees.

Before CARLAND, Circuit Judge, and LEWIS and BOOTH, District Judges.

CARLAND, Circuit Judge.

This appeal arises out of an application on the part of the receivers of the St. Louis & San Francisco Railroad Company, hereafter called the Frisco, to disaffirm and renounce a contract entered into February 28, 1898, between the predecessors of the Kansas City Southern Railway Company, hereafter called the Southern, and the predecessors of the Frisco, and other contracts supplemental thereto, whereby the predecessors of the Southern Company granted to the predecessors of the Frisco the right to use the depots and terminals of the predecessors of the Southern Company at a minimum monthly rental of $3,000 per month. The duty of the receivers to renounce the contract was approved by the District Court, and the Southern Company appealed.

[1-3] There is no question here but that the right of the receivers to renounce the contract is supported by sound administrative and business principles, conceding the use by the receivers of the terminals of the old Kansas City, Ft. Scott & Memphis Railroad, acquired by the Frisco in 1901, is lawful. The Southern, by its answer to the appli-

cation of the receivers, and during the subsequent proceedings, contended that the only reason that the contract of 1898 had become burdensome to the Frisco was because of the acquirement by it in 1901 of the Kansas City, Ft. Scott & Memphis Road, which gave the Frisco terminals at Kansas City over its own rails thereby causing a diversion of traffic which rendered the use of the terminal facilities granted by the contract of 1898 largely unnecessary. It was further contended that the acquirement of the Ft. Scott & Memphis by the Frisco, owing to the ownership by the Frisco of the Kansas City, Osceola & Southern Railway, was in violation of section 17, art. 12, Const. Mo., and section 3081 of the Revised Statutes of Missouri for 1909, and also in violation of the act of Congress of July 2, 1890, relating to trusts and monopolies. It is therefore argued that, as the receivers were using the Ft. Scott & Memphis terminals, acquired by the Frisco in 1901, they did not come into court with clean hands in asking that the receivers be allowed to renounce the contract of 1898. The paragraphs which presented this defense were on motion struck out of the answer, and hence on this appeal whatever facts were contained therein which were well pleaded must be taken as true.

It is well not to lose sight of the question which the District Court had before it. It was simply whether the court in its discretion and as a business proposition would continue to perform the contract of 1898. The contract was not one binding on the receivers until renounced, but was one not binding on them until assumed under the direction of the court. In this condition of the case, to hold that the court could be asked to investigate the circumstances attending the acquire[**706**]ment of the Ft. Scott & Memphis by the Frisco after the lapse of 14 years, not for the purpose of enforcing the Anti-Trust Law, but to enable it to decide whether it would as a matter of business assume the performance of the contract, would be to decide a matter irrelevant to the issue before the court. The Southern has no interest in the enforcement of the anti trust laws, other than to use them to prevent, if possible, the disaffirmance by the receivers of the contract of 1898.

Therefore we view with some moderation its allegation that the receivers do not come into court with clean hands. Moreover, the District Court took possession of the whole Frisco system through its receivers for a specific purpose. The whole system belonged to the Frisco. The court violated no anti-trust law of the United States or Missouri in taking possession of or in operating the Frisco system, as a reference to those laws will clearly show.

[4] The point is made that the order appealed from is not appealable. The order, of course, did not affect the validity of the contract between the Southern and the Frisco, but simply refused performance thereof on the part of the receivers. Still the effect of the order was to suspend a payment of $36,000 per annum on a contract which had 10 years to run before its expiration. We think we may take judicial knowledge of the fate of contracts made by an insolvent railroad company which passes into the hands of a receiver and are not assumed by him. Such contracts are practically ended. We therefore think the order was appealable. *Felton* v. *Ackerman*, 61 Fed. 225, 9 C. C. A. 457; *General Electric Co.* v. *Whitney*, 74 Fed. 664, 20 C. C. A. 674; *Kirkpatrick* v. *Eastern Milling & Export Co.* (C. C.) 135 Fed. 151.

Order affirmed.

UNITED STATES *v.* EASTMAN KODAK CO. ET AL.[a]

(District Court, W. D. New York. August 24, 1915.)

[226 Fed. Rep., 62.]

MONOPOLIES 12—ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF TRADE.—The Eastman Kodak Company, of New York, a corporation engaged in the manufacture and sale of photographic apparatus and supplies, including cameras, plates, films, and paper, in the course of some 15 years acquired the ownership of the property and business of about 20 competing concerns throughout the country, whose plants were dismantled and the business discontinued or transferred to its own plants. If corporation, they were for the most part dissolved, and their officers, or the partners, in case of firms, bound by

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[a] For opinion approving form of decree (230 Fed., 522) see *post*, page 910.

The case is pending in the Supreme Court on the appeal of the fendants.

Statement of the Case.

contract not to engage in competing business for terms of from 5 to 20 years. It also by contract with the makers obtained entire control in the United States of the imported raw paper which was recognized as the only standard paper for the manufacture of photographic printing-out paper, and by refusing to sell to other manufacturers compelled several competing companies to sell or go out of business. It acquired stock houses in the larger cities, which handled chiefly its own products, and by contracts with other dealers to [68] whom it sold fixed resale prices and required them to sell its goods exclusively. By such means it secured control of from 75 to 80 per cent of the entire interstate trade in the articles in which it dealt. *Held*, that such methods were intended and calculated to, and did, result in an undue and unreasonable restraint of interstate trade, and in securing to the Eastman Kodak Company a "monopoly" of a part thereof, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647 §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821).[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10, Dec. Dig. 12.

For other definitions, see Words and Phrases, First and Second Series, Monopoly.]

MONOPOLIES, 12—ACTS IN RESTRAINT OF TRADE—ARBITRARY USE OF POWER RESULTING FROM LARGE BUSINESS.—While the size of a corporation and the extent of its business do not alone constitute an illegal monopoly, they may properly be considered when its acquisitions of property are accomplished by methods showing an intention to monopolize and restrain interstate trade, and by an arbitrary use of power resulting from a large business to eliminate weaker competitors.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

In Equity. Suit by the United States against the Eastman Kodak Company, a corporation of New Jersey, the Eastman Kodak Company, a corporation of New York, George Eastman, Henry A. Strong, Walter S. Hubbell, and Frank S. Noble. On final hearing. Decree for complainant.

John Lord O'Brian, U. S. Atty., of Buffalo, N. Y., and *Mark Hyman*, Sp. Asst. Atty. Gen., for the United States.

Philipp, Sawyer, Rice & Kennedy, of New York City (*James J. Kennedy* and *William S. Gregg*, both of New York City, and *S. Wallace Dempsey*, of Lockport, N. Y., of counsel), for defendants.

Opinion of the Court.

HAZEL, District Judge.

This is a bill in equity brought by the United States attorney for the Western district of New York, under the direction of the Attorney General, against the Eastman Kodak Company, a corporation of New Jersey, the Eastman Kodak Company, a corporation of New York, George Eastman, Henry A. Strong, Walter S. Hubbell, and Frank S. Noble, to restrain the violation of the Sherman Anti-Trust Act. The Eastman Kodak Company of New Jersey, which was organized in the year 1901 with a capital of $35,000,000, is owner of the capital stock of the Eastman Kodak Company of New York, a corporation engaged in the manufacture of photographic materials and supplies, and of two other corporations, one English and one Canadian, similarly engaged. The individual defendants are officers and directors of the defendant corporations, and together they are charged with having entered into contracts and combinations in restraint of interstate trade and commerce, and with monopolizing a part of such trade.

The bill alleges substantially that during the years from 1902 to 1906 the principal defendant, the New York corporation, intentionally mo[64]nopolized the business of manufacturing and selling cameras, plates, photographic paper, and film in the United States, by acquiring the capital stock, property, plants. patents, and good will of about 20 competing companies, which were afterwards dissolved, the plants dismantled, and their businesses absorbed or removed to Rochester, N. Y.; that the Eastman Kodak Company of New Jersey acquired by purchase many stock houses engaged in different States in selling photographic supplies manufactured by defendants and their competitors; that the defendants, with the intention of monopolizing the importation thereof, acquired the exclusive right to sell in the United States and Canada raw paper stock from European paper mills, a necessity in the manufacture of photographic papers; that they also acquired by purchase a substantial part of the dry-plate industry throughout the United States, and monopolized the manufacture and sale of photographic film; that from 1899 to 1908 all photographic supplies manufactured by the Eastman Kodak Company were sold by dealers

under restrictions forbidding them to handle or sell the articles of competitors and fixing the sales prices, such restrictions being enforced by the payment of special discounts to dealers observing them, thus stifling competition. It is also alleged that such special discounts were discontinued in the year 1908, but that subsequently so-called terms of sale were adopted containing conditions that dealers carry only such materials for sale to customers as were sold to them by the Eastman Kodak Company at listed prices, and that no articles were to be consigned by them to others without first obtaining the permission of the manufacturing company. It was also provided in the terms of sale that the articles sold to dealers should not be sold by them to other dealers, and, furthermore, that the sale by them of specified patented articles in violation of the conditions of sale would entail a revocation of the right to deal in any of the Eastman commodities. By the acquisition of properties and the enforcement of said terms of sale the defendants, according to the bill, acquired the largest percentage of the trade in photographic materials, unlawfully restrained such trade, and obtained an illegal monopoly thereof. The relief prayed is a dissolution of the defendant companies and a disintegration of their business.

The defendants deny restraining trade or competition, or engaging in a monopoly, and asseverate that their status in the business of manufacturing and selling photographic supplies was a result solely of the creation and development within their plants of products of a superior quality, and of the manufacture of a type of camera in which it was the conceded pioneer.

The testimony in this case, which is one of much public importance, was taken before me at different times, and the case was fully argued on both sides by skilled and able counsel. The record comprises upward of 3,000 printed pages of testimony and three volumes of printed exhibits. The trial has been ingenuously and fairly conducted, without resort to technical objections to testimony, and without endeavor to conceal any of the acts claimed by the Government to have been wrongful, and by the defendants to have resulted from the in[65]generate growth of the business or

to have been necessary to its proper development. Although there is little, if any, conflicting evidence, the different inferences drawn by the litigants, even from the conceded facts, are so divergent that it is not without difficulty that the conclusions hereinafter set forth have been reached. Nor was it an easy task to apply the facts to the law, as the many adjudications cited in the briefs for my guidance are thought to be differentiable, necessitating a determination of this case upon the peculiar facts and circumstances presented, and requiring me to ascertain whether they come within the prohibitions of the Sherman Act as construed by the Supreme Court of the United States in *Standard Oil Company* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and in *United States* v. *American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, and whether the standard of reason rule emphasized in such decisions requires a holding that the defendants were simply beneficiaries of the natural expansion of the photographic art and the business of manufacturing and selling photographic materials, or of the conspicuous skill, industry, and sagacity of Mr. Eastman, who organized the Eastman Kodak Company, and whether the merging of the various enterprises was merely supplementary to an established business first in the field, and not for the purpose of protecting it, or whether, indeed, the defendants are guilty of forming a conspiracy or device to corral or concentrate the business, with a view to monopolizing interstate trade or commerce by the adaptation of unfair methods which tended to, and did, diminish or destroy the business of their competitors.

If the contracts between the Eastman Kodak Company and others, and the acquisitions of property complained of under the evidence, eventuated in an undue and unreasonable engrossment of trade, then without doubt, the act in question has been violated, and the Government may resort to the courts to suppress such violations. Monopolies are created in various ways, and may constitute partial restraints of trade, which of themselves are not unreasonable, and contracts or combinations creating them are not necessarily invalid. The statute prohibits only such monopolies as are

Opinion of the Court.

unjust and unreasonable restraints of trade. In *Nash* v. *United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232, the Supreme Court, referring to the Standard Oil and Tobacco Company cases, said:

"Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

Section 1 of the Sherman Act specifies restraint of trade by contracts, combinations, or conspiracies, while section 2 specifies monopolization or attempted monopolization, of any part of the trade or commerce among the States by combinations or conspiracies. In its lucid construction of this statute the Supreme Court in the Standard Oil case included equally restraint of trade or monopoly, either by a corporation or combination of corporations, or by an individual or combination of individuals, as falling within the prohibition; and what[66]ever indefiniteness exists in the text of the act is obviated by the language of Chief Justice White, who said:

"The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section."

And in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124, the Supreme Court said:

"The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in the conduct thereof."

—and recognized that a single dominating control in one corporation, whereby natural competition in interstate trade was suppressed, was violative of the statute.

In the recently decided case of *United States* v. *Keystone Watch Case Co.* (D. C.) 218 Fed. 502, Judge McPherson, after analyzing sections 1 and 2 as construed by the Supreme Court in the Standard Oil case, said:

"To fall within the prohibitions of the statute it is necessary that the unlawful restraint of trade—and this is not always the same thing as the mere restraint of competition—should be direct, and not merely incidental, and should also be undue or unreasonable. If it be both direct and undue, no disguise will save it; courts will search for the substance and the actual effect of the transaction, and, if trade be unlawfully restrained thereby, will grant the needful relief. There are many methods by which trade may be unduly restrained, and among these are contracts and combinations to fix and maintain prices, or to boycott the goods of a manufacturer or other dealer."

With this view of the law I am in entire accord. It makes no difference that the defendant corporations and the individual defendants were not in fact competitors or rivals in business, or separate entities; the Government does not rely upon a combination in restraint of trade, but attaches importance to contracts entered into with manufacturers of raw paper, to the acquisition or absorption of the business of competitors, and to sales price restrictions and other unfair conditions imposed upon dealers.

[1] The proofs are that in 1878 the defendant, George Eastman, entered the field of photography, organizing a small company for the manufacture and sale of wet collodion plates for the making of negatives. This process, which was practiced exclusively by professional photographers, consisted of coating a sheet of glass with iodized collodion and then immersing it in a solution of nitrate of silver to sensitize it and prepare it for exposure in a view camera. Later he [67] abandoned the wet collodion process, and having organized the Eastman Dry Plate & Film Company, the predecessor of the Eastman Kodak Company, began the manufacture of dry plates, adapting thereto the so-called gelatino-bromide of silver emulsion. This was a radical departure from the earlier process, making it possible to pre-

pare plates in advance and rendering it unnecessary to develop them immediately after taking the pictures. While this was a decided advantage, it was nevertheless still necessary to carry into the field for outdoor photography a somewhat heavy camera, with its tripod, glass plates, and plate holder, making photography too burdensome to attract many amateurs. The film-roll system of photography was then unknown. The printing-out paper used for making positives was an albumen paper coated with chloride and suitably sensitized, but was usable only for taking pictures by daylight. When the dry plates appeared on the market, manufacturers of cameras began to use them in connection with smaller and lighter view cameras, and a few hand cameras were produced by Scoville & Adams Company and by Anthony, including the Favorite, Waterbury, Bicyclist, so-called detective cameras, which, however, were regarded as novelties, and used only to a limited extent, disappearing from the market in 1894.

Between 1881 and 1884 Mr. Eastman, assisted by one Walker, experimented with photographic paper, a roll-holder mechanism, and film for use therewith. As a result of such experiments two patents, No. 317,049 and No. 317,050, were granted them on May 5, 1885, for roll-holder mechanism, enabling the unwinding of a paper film from one roll and winding it on another to expose different portions of it in the focal plane of the camera. In 1885 the Eastman Company began making machine-coated paper, and patents were granted covering the process and apparatus. By such process was produced a uniformly coated photographic paper, in the web or in strips, for adaptation to the film-roll system of photography—something greatly desired in the art. In 1884 patent No. 306,594 was granted to Eastman for a stripping paper film coated with gelatine emulsion, which could be laid, after exposure, upon a glass plate, and the negative film removed by moistening without its adhering to the glass plate from which the picture was printed. At this time there were comparatively few amateur photographers, as that term is [illegible] in the art, and it was expected that the roll holde[illegible] film would greatly increase their

number; but such did not prove to be the fact, their only use being by professional photographers as supplementary to the plate camera.

In June, 1888, Eastman produced a camera (patent No. 388,850) which he arbitrarily called a Kodak, consisting of an oblong box, 6½ inches in length, 3¼ inches in width, and 3¾ inches high, weighing 1½ pounds, and capable of 100 exposures. He employed a shutter device in connection with it, which was operated by pulling a string and pressing a button; the film being turned by a key to bring it into proper exposure. The Kodak was well received by the general public.

Mr. Eastman then experimented to produce an improved film, one that would remove the necessity of stripping the paper base from **[68]** the gelatine negative of the film—a difficult operation, undertaken only by the skilled photographer. Such experiments resulted in the substitution in the early part of 1889 of a nitro-cellulose transparent film or pellicle for the stripping paper film, for which patents No. 417,202, dated December 10, 1889, and No. 479,305, dated July 19, 1892, were granted to one Reichenbach, an employé, for the process, and patent No. 471,469, dated March 22, 1892, was granted Mr. Eastman for the apparatus. Although Hannibal Goodwin was the original inventor of the nitro-cellulose film or pellicle for use in connection with roll-holder cameras, as decided in *Goodwin Film & Camera Co. v. Eastman Kodak Co.* (D. C.) 207 Fed. 351, the Eastman Kodak Company was nevertheless the first to commercially use such film, and was generally accredited with being its originator. Its substitution for glass plates or stripping paper films, as indicated by laudatory articles in photographic almanacs and other publications devoted to photography, practically revolutionized the photographic art and immeasurably simplified the use of the camera.

In about the year 1895 there was invented by one Turner a photographic film roll or a so-called daylight loading cartridge (patent No. 539,713), which did away with the necessity of loading the camera in a dark room as was previously required. In 1897 a patent was granted to Eastman on an application filed by one Brownell, May 11, 1895, for

Opinion of the Court.

a pocket Kodak in which the film rolls were arranged in front of the focal lens—a departure from the earlier A. B. C. camera manufactured by the Eastman Company, in which the film rolls were arranged in the rear of the focal plane, a feature also described in the Houston patents, No. 526,445 and No. 526,446, dated September 25, 1894, which were later acquired by the Eastman Kodak Company. A camera called the Bullett, also having the film roll in front of the focal plane, was marketed by the Eastman Company in the year 1895, and was followed by a folding pocket Kodak and a Brownie camera, in which classes of film-roll cameras the said company claims to have been the pioneer.

Whether the defendant Eastman or the companies organized by him are entitled to be accredited with being the first to simplify the use of the film roll camera is questioned; the Government claiming that the invention of the dry plates was in fact the beginning of amateur photography, that impetus was afterwards given thereto by the introduction of various small hand plate cameras, and that later, about the year 1894, the Bullseye camera marketed by Blair & Turner revolutionized film photography. Evidence was given to show that from 1892 to 1894 sales of the Kodak, introduced by the Eastman Company in 1888, were steadily decreasing; it being pointed out that in 1892 the sales of Kodaks and apparatus amounted to $207,212.51, and in 1894 to $74,594.83, while the sale of films amounted to $102,404.29 in 1892 and to $81,319.48 in 1894, which decrease the Government attributed to the competition created by the appearance in the market of the Bullseye camera. It is shown that suits for infringement of the Walker & Eastman roll holder patents were instituted against Blair & Turner, and a preliminary injunction obtained, which was after[69]wards vacated; but that improvements in the camera were made by Turner, Houston, and others does not in my opinion change the fact that Walker and Eastman first solved the problem of the film roll camera by producing the roll holder to which reference has hereinbefore been made.

However that may be, in the years 1895, 1898, and 1899, the Eastman Kodak Company acquired the business of the Boston Camera Manufacturing Company, the American

Camera Manufacturing Company, and the Blair Camera Company, including their plants, properties, secret formulas, and trade-marks, entered into contracts with foreign raw paper concerns with regard to the importation of raw paper into the United States, and acquired plate camera and sensitized photographic paper concerns, the card stock business of Taprell, Loomis & Co., and 15 stock houses, and also imposed restrictions on dealers to the retail trade with regard to price, etc. For the sake of convenience these transactions, alleged in the bill to have been illegal acts, will be separately taken up.

In June, 1895, a license was granted the Eastman Kodak Company to make cameras under Turner patent No. 539,713 for a film roll, which patent, on August 10, 1895, was sold to the Eastman Company, together with the business of the Boston Camera Manufacturing Company, conducted by Turner and one Blair, for the inventory price plus $35,000, which was, however, by agreement subsequently reduced to $22,000; Turner agreeing in the conveyance that for a period of 5 years he would not engage in the manufacture or sale of cameras or articles used in connection therewith, within the States and Territories of the United States or within the District of Columbia. Blair was in Europe when his partner, Turner, sold the business; but, if this gave cause for criticism, it is not of importance in the present proceeding. It was contended by the Government that the sale by Turner was coercive, that it was made owing to the annoyance of the pending infringement suit, which it is claimed was brought in accordance with a preconceived plan to secure a monopoly; but the evidence is insufficient to support this view. The action was not illegal, and the parties had a right to compose their differences by a settlement involving transfers of property. *Virtue v. Creamery Package Company*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. 393.

In 1898 the Eastman Kodak Company acquired the business of the American Camera Manufacturing Company, organized a number of years previously by the witness Blair, with a capital of $25,000, to manufacture the Buckeye film camera—a camera similar to the Bullseye and embodying

Opinion of the Court.

the Houston patent for placing the spool film in front of the focal plane. Prior to the sale Blair asserted that the Eastman Company infringed the Buckeye camera by using the Houston adaptation, while the Eastman Company, claiming that the American Camera Manufacturing Company infringed its roll holder patents, brought a suit to restrain infringement; but before hearing the properties of the American Camera Manufacturing Company were taken over by the Eastman Company, Blair consenting to remain in its employ and agreeing not to engage on his own account in the manu[70]facture of cameras or photographic supplies in the United States or the District of Columbia for a period of 5 years. It was also agreed that Blair should assist the Eastman Company to acquire the Houston patents, and that if successful he should receive for his services $15,000. He succeeded in getting such an assignment, together with a release of the Eastman Company from liability for past infringements.

The evidence shows that Blair continued the operation of the American Camera Manufacturing Company plant as subsidiary to the Eastman Company for a short time, transacting a fair amount of business, but that the plant was nevertheless dismantled by the Eastman Company and the machinery and materials moved to Rochester, with the result that the manufacture and sale of the Buckeye camera was practically discontinued. Mr. Eastman stated with candor that the purchase of the plant was merely incidental to the primary object of acquiring the Houston patents, which were regarded as of great value. No threats were made to induce Blair to make the sale, and, while he testified that he was influenced to this end by the pending infringement suit, such suit, in my opinion, was not maliciously brought, and no unfair advantage was taken of him, as a concededly liberal price was paid for the capital stock of the company. Nor does any question of unfair treatment of E. & H. T. Anthony & Co., licensees of the American Camera Manufacturing Company, under the Houston patent, arise, for the East-
-ing such patent, permitted the
-acturing thereunder without fix-
-ameras.

Opinion of the Court.

In 1899 the Blair Camera Company, also organized by Mr. Blair a number of years previously, was acquired by the Eastman Kodak Company. At this time, however, Blair was not connected with the company, the principal owner being one Goff, who solicited Mr. Eastman to buy the business. At the time of the sale the Blair Camera Company was making the Hawkeye film camera, the base for its film being supplied by the Celluloid Company, and was the owner of the Crane patents No. 549,231 and No. 549,232 for improved roll holders employing black paper at each end of a perforated film. Mr. Eastman gave as a reason for acquiring the Blair Camera Company that he wished to acquire the Crane patents, as he believed it might be possible to develop by their adaptation a better method for exposing film, and also that prior to such purchase the Blair Camera Company was infringing the Houston patents. However, whatever the reason may have been, the purchase was not illegal; and in the absence of any unfair practices in the acquisition of such property I am disinclined to hold that there was anything wrongful in such transaction, or in any of the transactions by which the three specified companies were acquired. Up to this time the evidence fails to show anything unlawful in the operations of the Eastman Kodak Company; but it did not stop there, and it can scarcely be doubted that such acquisitions were the nucleus from which arose the intention to bring other companies manufacturing and dealing in photographic supplies under its control. Its commodities were extensively advertised and its business [71] grew rapidly, necessitating numerous additions to its manufacturing plants at Rochester at different times, beginning in 1890. Improvements were constantly being made in cameras, and the increasing simplicity with which they were operated rapidly increased the number of amateur photographers.

Modern photography is not dependent alone upon the camera for its success, but also upon the character of the raw paper used for what is technically known as printing-out paper. To produce good results the raw stock must be free from metallic substances, for metal has an injurious effect on the silver coating put upon the paper. It was generally

known in the photographic trade that approved raw paper stock could be obtained only at Rives, France, from Blanchet Frères & Kleber, or at Malmedy, Prussia, from Steinbach & Co., owing to the absence of metallic substances from the water at those points. These firms had for many years produced the concededly standard raw paper, and it was difficult to obtain any paper suitable for sensitizing purposes from any other source. Early in the year 1898 the said raw paper companies formed a combination and organized the General Paper Company of Brussels and at once increased the price of raw stock. At this time the Eastman Kodak Company was manufacturing gelatine printing-out papers called the Solio and Karsak papers, its business for 1898 amounting to $1,984,909.92. In 1894 the Eastman Kodak Company had acquired the Western Collodion Paper Company, and in 1898 it acquired the following companies: New Jersey Aristotype Company, Nepera Chemical Company, Photo Materials Company, Kirkland's Lithium Paper Company, the United States Aristotype Company, the American Self-Toning Paper Company, Brown & Palmer, and Palmer & Croughton. And in 1899 the defendants consolidated into the General Aristo Company the followings concerns: Eastman Kodak Company (paper business), American Aristotype Company, Nepera Chemical Company, New Jersey Aristotype Company, Photo Materials Company, and Kirkland's Lithium Paper Company, practically controlling the business of manufacturing printing-out paper in the United States. Other concerns manufacturing gelatine and collodion papers disappeared from the market at about this time, but as to the causes for their so doing the proofs are not conclusive.

Previous to said consolidation the American Aristotype Company was doing a large business in collodion paper, netting a profit in 1898 of approximately $124,751, and in September of that year its president and Mr. Eastman entered into an agreement in London, England, with the General Paper Company, by which the Eastman Kodak Company obtained control of the Malmedy and Rives papers in

l States for gelatine emulsion printing-out pa-

poses, while the American Aristotype Company obtained a similar contract in relation to collodion paper. It was provided that, in the event of competition arising, it should be driven out of the market, and the General Paper Company agreed to pay a proportionate rebate on all raw paper purchased from it and manufactured into printing-out paper sold at reduced prices for driving out such competition. It can [72] scarcely be doubted from this contract that it was contemplated to concentrate the manufacturers and dealers in photographic paper in the United States, and such impression is augmented by the letter in evidence, addressed by Mr. Goffard, of the General Paper Company, to Mr. Eastman, wherein he refers to the acquisition of said paper companies as being part of the program outlined to him when a monopoly of the raw paper stock was requested of him. There is also another letter in evidence from which it clearly appears that a general understanding existed between Mr. Eastman and the General Paper Company that no sales of raw stock should be made to any dealers in photographic papers or supplies in the United States except the Eastman Kodak Company and the American Aristotype Company, which became a subsidiary of the former.

As illustrative of the effect of such control of paper stock, attention is directed to the testimony of Dr. Kaekeland, who stated that he needed a quantity of raw paper, but that it was refused him by Steinbach & Co. on the ground, as Steinbach subsequently stated in a letter to the Eastman Company, that he "though it not prudent to accept an order for such a long time that could be an obstacle to an arrangement with the Nepera Chemical Company." He also testified that during the summer of 1898 he was informed by the sales agent of the General Paper Company that in the future he must buy his raw stock from the Eastman Kodak Company, but that instead of so doing he went to Europe to arrange for a supply of raw stock, and was there joined by Mr. Eastman, who remarked that the Nepera Paper Company had made inroads in the trade in some articles manufactured by the Eastman Kodak Company, but that he would let Baekeland have raw stock on the condition that the sensi-

Opinion of the Court.

tized paper business of the Nepera Company would not increase more than 15 per cent. To this Dr. Baekeland demurred, requesting permission to increase the business by 50 per cent. This request was denied, and the negotiations ended without his receiving any raw paper. Immediately on his return to the United States, in anticipation of difficulty in later obtaining it, he purchased as much raw paper, foreign and domestic, as he could, and was able to get from the American Photographic Paper Company paper adaptable for certain grades of Velox paper—a gaslight developing-out paper manufactured under his direction. However, the Nepera Chemical Company afterwards sold out its plants and properties to the Eastman Kodak Company under restrictive conditions to the effect that its officers were not to engage in the business of making sensitized photographic paper in North America for a period of 20 years, and the business was later moved to the plant of the defendant company at Rochester.

It will be unnecessary to dwell upon the manner in which the first and second raw-paper contracts were made effective by agreements among certain other foreign companies, including G. H. Beneke and the Aschaffenburg Company, baryta coaters of photographic paper, and by the paying of indemnities. On December 9, 1898, an announcement was made to the trade by the Eastman Kodak Company that it had been appointed sole agent for Steinbach and Rives raw [73] paper for use in gelatine printing-out processes, and that discounts to consumers of Solio paper or any other paper sensitized from Steinbach and Rives stock would in the future be prohibited. This announcement was followed by a circular letter reading as follows:

"We call your attention to the fact that the Rives and Steinbach concerns make the only raw stock that has been successfully used for the manufacture of sensitive photographic papers. Having made us their sole agents for their papers for use in gelatine printing-out processes in the United States, Canada, and Mexico, all raw stock of their manufacture must of necessity pass through our hands. The raw paper will only be sold by us to other coaters who market [illegible] uct under conditions similar to those upon which we sell [illegible] coated by ourselves. The New Jersey Aristotype Company, [illegible] field, N. J., the Photo Materials Company, Rochester, N. Y.,

Palmer, successor to Palmer & Croughton, Rochester, N. Y., are at present the only authorized coaters of Steinbach and Rives raw stock for gelatine printing-out process."

Terms of sale binding upon all dealers in photographic papers were thereupon put into effect. Discounts on raw paper were reduced from 25 per cent to 15 per cent, but an additional discount of 12 per cent was allowed to dealers who manifested by certificate that they had complied with the Eastman restrictions, which required the dealer to sell no other gelatine printing-out paper than that sold him by the Eastman Company. The New Jersey Aristotype Company and the American Aristotype Company, which has been acquired by the Eastman Company, required similar certification as a condition of the payments of discounts.

It was also shown that arrangements were made between the American Photographic Paper Company and the General Paper Company, whereby Mr. Curtis, who was connected with the former company, agreed not to manufacture, deal, or experiment in photographic paper, except with the consent of the General Paper Company, in consideration for which the latter agreed to buy 100,000 pounds of paper a year and pay the former an annual indemnity of $8,500. Thus the American manufacturers of photographic paper became subservient to the General Paper Company of Brussels, and the Eastman Kodak Company accomplished its purpose of controlling in this country the raw-paper stock industry, both foreign and domestic.

The contract in question was renewed on December 20, 1906, for a term of nine years, without, however, including the baryta coaters, and continued in force until June 30, 1910, when it was canceled by mutual consent; such cancellation no doubt being due to the acquirement of the Artura Company by the Eastman Company (Government Exhibit 387) and the disinclination of the General Paper Company to bear further losses due to putting fighting brands of paper on the market (Government Exhibit 382). As a result of such contracts many competitors of the Eastman Company were interfered with in their business and some were driven from the market. By their inability to obtain

raw paper their customers were compelled not only to buy sensitized paper from the Eastman Company, but to handle Eastman products exclusively. Such use of the raw-paper contracts can not be justified by any plea that they were necessary to keep the [74] foreign raw-paper combination from entering into business in the United States.

Anthony testified that in 1901, as a result of restrictive agreements with dealers, there were only from 2 per cent to 3 per cent of them who were not receiving their supplies from the Eastman Company; and Cramer testified that, as late as the years 1906 and 1907, 5 per cent of all the professional dealers and about 98 per cent of the so-called side-line dealers in the United States were selling products of the Eastman Kodak Company exclusively. The witness Kilborn testified that in 1898 and 1899 he was unable to get any suitable raw stock for making collodion paper; that he imported stock direct from Germany, and later bought some in this country from the Columbia Photo Paper Company, but that neither was satisfactory. Colwell testified that he was engaged in manufacturing sensitized photographic papers under the name of Kirkland's Lithium Paper Company, and had bought his stock from Rives or from the Aschaffenburg Company until February, 1899; that he then had about 10,000 or 12,000 customers, but was unable to obtain any raw paper. In this situation he was informed by Mr. Eastman that he could obtain paper only through him, as he had control of the mills that made it, and Mr. Eastman's proposal to purchase the Kirkland's Lithium Paper Company was then made and accepted. Waite testified that Mr. Eastman offered the American Self-Toning Paper Company, of which he was secretary, $60,000 for its business in the year 1898, which offer was declined, and that later, having difficulty in obtaining raw stock, the American Self-Toning Paper Company went out of business. Dailey, owner of the United States Aristotype Company, testified that he could not obtain Aschaffenburg coated paper or Steinbach paper, in which he had been dealing, and that there was no paper in this country of equal quality; that he endeavored to obtain such paper from the Eastman

Kodak Company, but was informed that their supply was sufficient only for their own requirements; and that his business was greatly depreciated as a result of the rebate system inaugurated by the Eastman Kodak Company, dealers in many instances declining to further handle his product. Gennert testified that in the year 1900 he attempted to buy Rives and Steinbach stock for collodion printing-out paper, but failed in the attempt. The Defender Company likewise had difficulty in obtaining satisfactory raw paper; and in 1909 Eastman acquired 60 per cent of its stock, which fact was concealed from the trade, and film thereafter sold by the Defender Company was manufactured by the Eastman Company, but falsely marketed as Vulcan film—a product of the Defender Company—and the price at which it should be sold by the latter and the discounts to the trade were "discussed" and determined upon.

There was other testimony to show interferences with the trade by reason of the control by Eastman of the raw paper stock, but it need not be dwelt upon. The evidence shows that in the year 1901 the General Aristo Company, a consolidated company, practically sold 95 per cent of the photographic paper in the country, and that in [75] 1904, when other satisfactory papers were available to the trade, its business in such commodity amounted to but 75 per cent.

On May 31, 1892, the Eastman Kodak Company acquired the business and good will of the Standard Dry Plate Company, of Lewiston, Me., later moving the machinery and merchandise to its plant at Rochester, and in 1907 the Standard Company was dissolved by order of the court. In August, 1902, the M. A. Seed Dry Plate Company, of St. Louis, was acquired under restrictive covenants that its officers should not engage in the business of manufacturing photographic dry plates within a period of 10 years without the consent of the Eastman Kodak Company. The assets of the M. A. Seed Dry Plate Company were $656,742.90, its liabilities $7,496,148. It was paying dividends at the rate of $240,000 per annum, and was doing a business of $795,728.48; it was employing about 600 employés, but the plant was dismantled and the business moved to Rochester.

The corporation was dissolved in 1911. The Stanley Dry Plate Company, of Newton, Mass., was acquired in January, 1894, also under restrictive covenants on its officers not to engage in the manufacture of dry plates. This company was legally dissolved in 1905.

From 1902 to the date of the filing of the bill, the Eastman Kodak Company acquired the following stock houses, which were scattered through the United States and were engaged in selling photographic supplies: Sweet, Wallach & Co., Chicago, Ill.; O. H. Peck Company, Minneapolis, Minn.; Zimmerman Bros., St. Paul, Minn.; John H. Fouchs Company, Minneapolis, Minn.; Kortwright & Kline Company, Sioux City, Iowa; Milwaukee Photo Materials Company, Milwaukee, Wis.; Robey-French Company, Boston, Mass.; Robert Dempster Company, Omaha, Nebr.; Albert Sellner Company, Quincy, Ill.; Good & Schroeder, Chicago, Ill.; John Haworth Company, Philadelphia, Pa.; Northwestern Photo Supply Company, Seattle, Wash.; Glenn Photo Stock Company, Atlanta, Ga.; Standard Photo Supply Company, New Orleans, La.; Denver Photo Materials Company, Denver, Colo.; Howland & Dewey Company, Los Angeles, Cal. In 1903 the Eastman Kodak Company acquired the Century Camera Company and the Rochester Optical & Camera Company, plate camera concerns engaged in business at Rochester, N. Y., and in 1905 the Folmer & Schwing Manufacturing Company, a plate camera concern of New York.

It is difficult to avoid the conclusion that the acquisition of the various companies was for the purpose of suppressing competition and in furtherance of an intention to form an illegal monopoly. Especially is this true when it is observed that in nearly every instance the conveyances contained restrictive covenants prohibiting the officers of the acquired concerns from re-entering the business for periods ranging from 5 to 20 years, thus serving, as said in the Tobacco case, "as perpetual barriers to the entry of others" into the trade in question. As opposed to this view, the defendants contend, among other things, that the stock houses after purchase did not discontinue the sale of competing articles, and that out of 146 stock houses in the

United States the defendant company controlled but 12 per cent, and [76] sold only approximately 12 per cent of its own products through them; but these contentions are not based strictly on the facts. The evidence shows that only a small proportion of the goods thus handled are purchased from other concerns; 86 per cent of purchases, amounting to $1,838,952.13, being purchased from the Eastman Kodak Company. It was also urged that the restrictive covenants and acquisitions were necessary for the protection of the good will of the business, and that in most instances there was an inclination on the part of the vendor to sell. It is true that the defendants paid full value and more, giving money together with stock in a larger and more progressive enterprise in return for the property acquired; but in view of the fact that a majority of the plants were dismantled and the businesses concentrated at Rochester it is evident that they were not actually required by the defendants in carrying on their business, but were acquired with an idea of monopolizing trade, under which circumstances the details of the transactions are immaterial.

It appears that independent dealers were established by competitors as a protection from the encroachments of the Eastman Kodak Company; that in 1908 developing-out paper came into more extensive use, and Artura paper, which, though not entirely free from metallic substances, was nevertheless adaptable for such process, came rapidly into favor. To meet increasing competition from this source the defendants, unfairly I think, marketed the Nepera paper at reduced prices, and warned their dealers to refrain from dealing in Artura paper, although such paper was preferred by photographers. The Eastman Kodak Company afterward acquired the Artura Company for the sum of $1,250,000, restricting its officers from re-entering the business for 20 years; and although the former company, after dismantling the plant, retained in its employ a number of the officers and directors of the latter company, upwards of 180 employés were thrown out of work.

In 1899 a number of concerns manufacturing folding plate cameras, mainly for the amateur trade, to wit, the

Opinion of the Court.

Rochester Camera Supply Company, Rochester Optical Company, Ray Camera Company, Western Camera Company, Monroe Camera Company, and the E. H. & T. Anthony Company, consolidated and formed the Rochester Optical & Camera Company, of which the Eastman Kodak Company at first was trade agent, but later became the owner.

Considering next the conditions imposed on dealers in relation to price and the exclusive handling of Eastman products, that the business of the defendants increased in magnitude as a result of such restrictions, which operated to drive out competition, is to me too plain for controversy. The price listing of commodities and the adoption of arbitrary rules to enforce the restrictions, in my opinion, so precluded freedom of ownership that they cannot be extenuated by the submission to the dealers of the questions of whether such restrictions should be adopted, or rigorously adhered to, or modified. The dealers, in view of the circumstances, no doubt were constrained to acquiesce in them, not only because of the discounts and extra profits that they would thus receive, but also because of the policy of limiting the [77] number of dealers by preventing others from entering business in their vicinity. Such trade policies were emphatically condemned in *State* v. *Standard Oil Company*, 49 Ohio St. Rep. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541. Monopolies thus formed are bound to become burdensome and menacing to our industrial welfare and are entirely at variance with wholesome business conditions. Generally speaking, I think that a business should not be permitted to develop to such proportions as to unreasonably engross a trade. The devising of means for deterring others from manufacturing certain articles, or restricting the localities in which they may deal in such articles, fixing sales prices, or adopting regulations for governing dealers, to be enforced by special rewards or penalties, inevitably result in concentration of business in the hands of a few, and may also result in giving to a single person or corporation such a unification of interest or man- [illegible]t as to constitute an illegal monopoly. This prin-

ciple finds support in *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689.

It is true that after the decision in *Dr. Miles Medical Company* v. *Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, where the attempt by a manufacturer to control sales prices to consumers, even as to products made under a secret formula, was condemned, the defendants modified their restrictions with reference to the exclusive handling of photographic paper, certain view cameras, and a few other articles, but continued them unchanged as to others. But in my view the right to fix prices at which dealers may sell to customers and to impose on dealers conditions requiring them to sell defendants' goods exclusively, or the right of a patentee to control resale prices on a patented article, are not controlling factors herein. It is settled law that a patentee may not by notice limit the price at which a patented article is to be sold at retail, where the retailer bought the article from a jobber, paying the full price therefor. *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas, 1915A, 150; *United States* v. *Keystone Watch Case Company* (D. C.), 218 Fed. 502. But the terms of sale in force in this case at the time of filing the bill fixed the price on all products (except as heretofore stated), regardless of whether they were patented or not, and bound the dealers to confine their sales to Eastman products. The sales restrictions, together with the raw-paper contracts, the acquisition of plants and properties, stock houses, etc., and the covenants against producing photographic materials, indicate an intention to supplant competitors and to unduly and unreasonably restrain and monopolize interstate trade in photographic supplies. The intent and purpose with which the corporation defendants and the individual defendants participated in the various transactions, which when standing alone may be innocent enough, but which when correlated assume a different aspect, are proper subjects of inquiry. *U. S.* v. *Union Pacific Railroad Company*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124.

Defendants argue generally that manufacturers have the legal right to encourage dealers by extra profits or by other

fair inducements to [78] handle their goods exclusively; that such an arrangement is to the interests of both; and that the Eastman Kodak Company was the first to induce stationers, druggists, and others to handle photographic goods as a side line. All this and more, it may be conceded, separated from other acts, might furnish no ground for holding that there was an illegal monopoly; but the arbitrary enforcement of the restrictive conditions by the establishment of a system of espionage, and the keeping of records of violations of such conditions, with a view of penalizing such dealers, are evidences of an intention to promote a monopoly. In this connection the language of the court in *State* v. *International Harvester Co.*, 237 Mo. 369, 141 S. W. 672, and quoted in *United States* v. *International Harvester Co.* (D. C.), 214 Fed. 987, may be fittingly applied. There the court said:

> "In the case at bar we are to take the acts of the parties and judge their purpose by the consequence that would naturally result. When men deliberately and intelligently go to work and acquire power that will enable them to control the market, if they choose to exercise it, there is no use for them to say that they did not intend to control the trade or limit competition; nor, when the legality of their act of acquisition is in question, is it any use for them to say, 'We have not used the power to oppress anyone.'"

It is asserted that the right of a patentee to restrict the sales price of a patented article by agreement with the retail dealer has not been broadly decided; but it has been decided that patent rights and sales price restrictions for a patented article cannot be used as a shield to nullify the Sherman Act. As said by the Supreme Court in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107:

> "Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions."

It will be observed that the bill of complaint makes no mention of cinematograph film for moving pictures, but testimony in relation thereto was received over the objection of counsel. It was believed at the hearing that the term "film," as used in the bill, was sufficiently comprehensive to include

different kinds of film and the uses to which it is put; but I now believe that it applies solely to film used in connection with hand cameras or film-roll cameras, and that it was not intended at the time the bill was prepared to include moving-picture film or any contracts or combinations in relation thereto as violative of the statute.

In the case of *United States* v. *United Shoe Machinery Company*, 222 Fed. 349, recently decided, the pleading of the Government in a similar litigation under the Sherman Act was strictly construed, and the evidence confined to the specific acts averred in the bill. But, disregarding for the moment such technical objection, I am of the opinion that the contracts in evidence of the Eastman Kodak Company with the Motion Picture Patents Company and its licensees, and with the witness Brulatour, were not violations of the statute. Moving-picture film has never been sold by the defendants under any terms of sale agreements, nor was it sold by dealers handling a general line **[79]** of photographic materials. The Eastman Kodak Company was the first to commercially manufacture such film, which according to the evidence is made somewhat differently from roll film for cameras, either in this country or abroad, and a patent was granted Eastman for the process of making it. The contract (Government Exhibit 240) by which the Eastman Kodak Company agreed to supply to the Motion Picture Patent Company all the film manufactured by it to the exclusion of other purchasers of moving-picture film, except an amount equal to 2½ per cent, was not an illegal contract. *United States* v. *United Shoe Machinery Company*, *supra*. The record shows that the so-called independent moving-picture concerns were using Lumiere film, a product of France, and that one Brulatour, its agent in this country, afterwards arranged with Mr. Eastman to obtain the film required by him and his customers exclusively from the Eastman Kodak Company. Although the testimony of the witness Brulatour in respect to the defectiveness of the Lumiere film was severely criticized by the Government as unreliable, I think it was fairly shown by the testimony of customers that grounds for complaint existed, and that East-

man film was desired by moving-picture concerns, and that no intention was shown to illegally monopolize or restrain interstate trade in such commodity by the transaction in question.

The record abounds in compiled figures showing that large amounts of money were paid to acquire the competing concerns to which reference has herein been made, and to show their standing in the trade to prove that such acquisitions were not merely amalgamations of small concerns; also to show the amount of business transacted in different materials by the Eastman Kodak Company, its great gains and profits, which for the year 1912 amounted to $15,633,551.33, or about 171 per cent on total sales amounting to $24,763,407.65, and showing the large disproportion between the cost of manufacture and the price paid by the consumer. Whatever reduction the Eastman Kodak Company may have made as to price, on portions of the photographic paper or other materials sold by them, does not compensate for the suppression of competition in the industry as a whole, and it is no justification of an illegal monopoly to assert that it has reduced the price of an article produced by it, as this may have been done simply to injure a rival. *Richardson* v. *Alger*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

But all these matters require no further special attention, save in so far as they bear upon the monopolization of the interstate trade in cameras, film, plates, and photographic paper; and as to these articles it is undisputed that the Eastman Kodak Company controlled approximately between 75 per cent and 80 per cent of the entire trade at the time of filing the bill, and had accordingly attained a monopoly thereof. The burden rested upon the defendants to prove that this was accomplished by lawful methods; that is, that it resulted from normal processes of growth, from the mere acquisition of property, or from the superior merit of the products, assuming this to have been an important factor; and after careful consideration of the various defenses interposed I have concluded that such burden [80] has not been borne, but that, on the contrary, the Government has shown that interstate trade and commerce have been

unjustly and abnormally restrained by the defendants by the formation of a monopoly induced by wrongful contracts with regard to raw paper stock, preventing the trade from obtaining such stock, by the acquisition of competing plants, businesses, and stock houses, accompanied by covenants restraining the vendors from re-entering the business, and by the imposition on dealers of arbitrary and oppressive terms of sale inconsistent with fair dealing, and suppressing competition. Such acts, when taken together, are most significant and seem to me to indisputably disclose an intention to violate section 2 of the Sherman Act.

[2] There is marked dissimilarity between the acts disclosed in the record herein and those disclosed in *United States* v. *United Shoe Machinery Company*, *supra*, decided in favor of defendant, and those of other cases to which my attention is directed by defendants, wherein the evidence in the judgment of the court did not establish a combination in restraint of trade or a monopoly. In *United States* v. *Keystone Watch Case Company*, *supra*, it is true, there were acquisitions of plants and properties of competing manufacturers, and the court said it was no offense to add one department to another as the business prospered or ambition increased; that the size and varied character of the enterprise do not of themselves constitute a violation of the statute. To this principle I assent. There is no limit in this country to the extent to which a business may grow, and the acquisitions of property in the present case, standing alone, would not be deemed an illegal monopoly; but when such acquisitions are accompanied by an intent to monopolize and restrain interstate trade by an arbitrary use of the power resulting from a large business to eliminate a weaker competitor, then they no doubt come within the meaning of the statute. In the Keystone case the court held that, although the prices were fixed, considering everything done, no monopoly was created. As to a circular restricting prices and forbidding dealers to sell goods of other manufacturers, the court said that the adaptation and enforcement of such policy operated as an unlawful restraint upon interstate trade, and

as to this an injunction was granted. Support for the holding in this case is found in *United States v. Gt. Lakes Towing Company* (D. C.) 208 Fed. 733, where the court held that the sale of a business with an agreement within reasonable limitations not to enter into competition with the buyer, when it was not a device to monopolize, was not illegal, but that the acts of the defendant in cutting towing rates until competition was ended, and then restoring the previously existing rates, the exclusive contracts with vessel owners to tow vessels, and the giving of large discounts from tariff rates, were illegal acts, when by such means a practical monopoly is effected.

The final question relates to the nature of the decree. The Government intimated at the hearing that under chapter 311, an act passed September 26, 1914 (38 Stat. 717), to create a Federal trade commission, this court had the discretionary power, if it was proven that complainant was entitled to relief, to refer the case to such commis- [81] sion as a master in chancery to ascertain and report the appropriate form of decree herein; but in my opinion there is no present necessity for adopting this course, as by section 4 of the Sherman Act the equitable remedy to which resort may be had in such a case as this is pointed out, and the court vested with jurisdiction to prevent and restrain further violations of the act. In the Standard Oil case, *supra*, Mr. Chief Justice White said:

"It may be conceded that ordinarily, where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, 196 U. S. 375 [25 Sup. Ct. 276, 49 L. Ed. 518.] But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies twofold in character becomes essential: (1) To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. (2) The exertion of such

measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

These remedies are thought applicable to the present situation. Although counsel for defendants concede that the court has power to dissolve an illegal combination of competing units, they nevertheless argue that no dissolution should be decreed herein, as the acquired property consisted of non-competing units; but, as hereinbefore indicated, I do not agree with this contention. It makes no difference that some or all of the acquired concerns differently constructed some of their products, inasmuch as they were all engaged in the same business; that is, manufacturing or dealing in photographic supplies. The record (Appendix L) shows that the total sales by defendants in 1912 of self-developed products amounted to $14,082,696.55, and of acquired products to $3,800,716.53, from which it would seem that no irremediable hardship would result from a separation of the present business into two or more independent companies. However, it is not at this time intended to indicate either a dissolution, division, or reorganization of the business of the defendants. It no doubt is possible that an adequate measure of relief might result from enjoining the unfair practices of the terms of sale agreements, and from a separation of the business; but the defendants should have an opportunity to present to the court on the first day of the 1915 November term a plan for the abrogation of the illegal monopoly which unduly and unreasonably restrains interstate trade and commerce.

In the meantime jurisdiction is retained by this court to make such other orders and decrees as may be deemed necessary to the granting of the relief demanded in the bill, or such other relief as the equities of the case may require, with costs.

Statement of the Case.

UNITED STATES v. EASTMAN KODAK CO. OF NEW YORK ET AL.[a]

(District Court, W. D. New York. January [illegible], 1916.)

[230 Fed. Rep., 522.]

MONOPOLIES 28—SUIT TO DISSOLVE—MANNER OF DISSOLUTION.—A proposed plan for the abrogation of an illegal monopoly in photographic cameras, films, papers, and plates, which did not provide for the separation of the business of manufacturing the various units of manufacture, did not afford the relief to which the Government was entitled, where the various units were combined with the intention of monopolizing and restraining trade in such products, and their manufacture constituted the monopoly, even though some of such units were fairly non-competing.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 28.]

MONOPOLIES 28—SUITS TO PREVENT—LACHES.—The doctrine of laches is inapplicable to a suit to abrogate an illegal monopoly, where some of the acts in furtherance of the monopoly were committed just before the filing of the bill, and in addition to this, defendants were apprised before the beginning of the suit that their methods of doing business were deemed by the Government violations of the statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 28.]

MONOPOLIES 28—SUITS TO PREVENT—FORM OF JUDGMENT.—In a suit to abrogate an illegal monopoly in photographic supplies, in which it had been determined that the Government was entitled to a decree in its favor, proposed final decree held proper.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 7; Dec. Dig. 28.]

In Equity. Proceeding by the United States against the Eastman Kodak Company of New York and others. On petition for approval of plan for abrogation of illegal monopoly or for reference to the Federal Trade Commission. Reference denied, and decree signed.

For former opinion, on the hearing of the merits, see 226 Fed., 62.

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[a] For prior opinion (226 Fed., 62), see ante., page [illegible].

[b] Syllabus copyrighted, 1916, by West Publishing Company.

The case is pending in the Supreme Court on the appeal of the defendants.

[523] The defendants on November 23, 1915, submitted a plan, under the opinion of August 24, 1915, and on January 7, 1916, filed a petition that, if the court did not approve this plan, the suit be referred to the Federal Trade Commission to ascertain and report an appropriate form of decree.

Mark Hyman, of New York City, and *John Lord O'Brian*, of Buffalo, N. Y., Sp. Asst. Attys. Gen., for the United States.

William S. Gregg and *J. J. Kennedy*, both of New York City, for defendants.

HAZEL, District Judge.

[1] 1. I have given consideration to the proposed plan for the abrogation of the illegal monopoly which the court has heretofore found unduly and unreasonably restrained interstate trade and commerce in photographic supplies, and think such proposed plan would not afford the relief to which the Government is entitled. A dissolution of the monopoly created by the illegal methods specified in the opinion filed herein is not included in the proposed plan; it fails to provide for a separation of the business—the manufacture of cameras, films, papers, and plates.

The argument of counsel for the defendants that these articles are non-competing, and that a division of the business into separate entities could not create competitive conditions, has again been considered by me; but as their manufacture constitutes the monopoly, which it has been held was not achieved by purely legitimate means I must adhere to my original views on this question. I think that, as various units of manufacture and production (even assuming some of them to be fairly non-competing) were combined with the intention of monopolizing and restraining trade in such products, and as objectionable practices were resorted to, something must be done to separate or divide the business into independent companies in order to restore competitive conditions. This, I think, is not impossible, and may be done without greatly prejudicing the property interests

involved. In any event the mere removal of incidental evils and practices would tend to legalize the monopoly.

A re-examination of *United States* v. *St. Louis Terminal Co.*, 224 U. S., 383, 32 Sup. Ct., 507, 56 L. Ed., 810, *United States* v. *Great Lakes Towing Co.* (D. C.), 208 Fed., 733, and the *Keystone Watch Case* (D. C.), 218 Fed. 502, satisfies me that they do not point out the nature of the decree that should be entered in this case. At first I was inclined to think they did, but I am now convinced to the contrary. The larger portion of the business of the Towing Company related to towing vessels into local harbors. The towing tugs were not engaged in interstate commerce, and it can scarcely be held that there was competition between such tugs and tugs in other ports. It was not unlike the St. Louis Terminal case, wherein the Supreme Court permitted the elimination of illegal practices which were in the nature of administrative conditions; the illegal combinations, consisting of terminal facilities, not being otherwise engaged in restraining interstate trade.

[2] 2. The doctrine of laches is inapplicable herein, as some of the acts in furtherance of the illegal monopoly were committed just be[524]fore the filing of the bill, and in addition to this the defendants were apprised before the beginning of the suit that their methods of doing business were deemed by the Government violations of the Anti-Trust act (act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1913, §§ 8820–8830]).

[3] 3. The final decree submitted by the Government is thought satisfactory, but I shall withhold my signature for a few days to give the defendants an opportunity to make known any objections they may have to the form thereof. This proposed decree will enable the defendants to take an appeal to the Supreme Court and have the important questions herein involved determined once and for all. In the meantime an interlocutory decree may be entered, the terms of which may be settled on application for a supersedeas.

4. There is no necessity at this time for referring the matter to the Federal Trade Commission, as such procedure may be resorted to after a decision has been rendered on the appeal by the Supreme Court.

Decree.

The decree signed by the court and duly entered is as follows:

"This cause came on to be heard at this term and was argued by counsell; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

"(1) The defendants, George Eastman, Henry A. Strong, Walter S. Hubbell, and Frank S. Noble (hereinafter called the individual defendants), and Eastman Kodak Company of New York and Eastman Kodak Company of New Jersey (hereinafter called the corporate defendants), have combined, conspired, and participated in various transactions directly affecting the trade and commerce among the several States in photographic supplies, consisting of cameras, films, plates, and photographic paper, with the purpose and intent of unduly and unreasonably suppressing competition and restraining and monopolizing such trade in violation of the act of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.' Thereby the corporate defendants have engrossed and monopolized, and will engross and monopolize, between 75 and 80 per cent of such trade, and accordingly attained, and now hold, an illegal monopoly thereof, which in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered separately or collectively, violates sections 1 and 2 of said act of July 2, 1890. Said monopoly was induced by wrongful contracts with regard to raw paper stock, by preventing the trade from obtaining such stock, by acquiring competing plants, businesses, and stock houses, dismantling acquired plants, and restraining the vendors from re-entering the business, by imposing on photographic dealers arbitrary and oppressive terms of sale, and other regulations inconsistent with fair and free dealing, and arbitrarily enforcing the same through the establishment of a system of espionage and the keeping of records of violations, with a view of penalizing dealers, by limiting the number of dealers, and in general by suppressing competition by the foregoing and other means.

"(2) The individual defendants, and the corporate defendants, their subsidiaries, and their successors, together with their respective officers, directors, agents, servants, and employés, are hereby severally enjoined from continuing or carrying into further effect the monopoly herein adjudged illegal, or any of the contracts, conspiracies, restraints on trade, terms of sale, regulations, or practices, or any similar acts, which induced said monopoly, or which might in the future restrain commerce in photographic supplies among the States, or induce or prolong an unlawful monopoly of such commerce.

"(3) The monopoly herein adjudged illegal shall be abrogated, and to that end the business and assets of the defendants Eastman Kodak Company, a corporation of New Jersey, and Eastman Kodak Company, a corporation of New York, be divided in such manner

Syllabus.

and into such number of parts of separate and distinct ownership as may be necessary to establish competitive [525] conditions and bring about a new condition in harmony with law; and the defendants shall file with the clerk within 90 days from the entry of this decree a plan for such separation and division for the consideration of this court. In the event this case is appealed and the decree superseded within 60 days from the entry thereof, the time within which the defendants shall file said plan is hereby extended to 60 days from the filing of the mandate of the Supreme Court with the clerk of this court. Jurisdiction is retained by the court to make such additional orders or decrees as may be necessary to carry this decree into effect.

"(4) Inasmuch as trade in cinematograph film and foreign trade in photographic supplies are not covered by the petition herein of the United States of America, no decree in regard to such subjects is made herein, but without renouncing the power and duty of this court to deal with all the property and business of every character of the corporate defendants in effecting the abrogation of the monopoly herein adjudged illegal.

"(5) Nothing in this decree contained shall prevent the defendants, or any of them, from the institution, prosecution, or defense of any suit, action, or proceeding involving any of their property or rights.

"(6) The petitioner shall recover from the defendants the costs of this suit, to be duly taxed herein.

"(7) The injunction granted by the second sub-division of this decree shall take effect 60 days after the entry of this decree, in case no appeal is taken from it. If an appeal be taken, and the decree be superseded, its operations shall be suspended until such time as shall be fixed in the final decree of this court entered on the mandate of the Supreme Court."

UNION PAC. R. CO. ET AL. *v.* FRANK ET AL.

FRANK ET AL. *v.* UNION PAC. R. CO. ET AL.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1915.)

[226 Fed. Rep., 906.]

MONOPOLIES 24—ANTI-TRUST ACT—SUITS FOR VIOLATION—WHO MAY MAINTAIN.—A private individual may not maintain an action to enforce generally the provisions of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209; but, in order to rely upon its provisions, an individual must base his cause of action upon its violation,

Statement of the Case.

and show a special damage to himself arising from such violation, not suffered by the general public.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

CORPORATIONS 182—STOCK CONTROL BY ANOTHER CORPORATION—RIGHTS OF MINORITY STOCKHOLDERS.—A railroad company, which through stock ownership controls another company, owning and operating a connecting line, cannot be charged with a breach of duty toward minority stockholders because of expenditures made in reconstructing and improving the line of the controlled company, although such expenditures inured to its own benefit, where they were made by the directors of the controlled company in good faith, and proved, as expected, of large benefit to that company as well, by reason of largely increased traffic through the connection, to obtain which they were necessary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686–690; Dec. Dig. 182.]

Rights of minority stockholders as to management of corporate affairs, see note to *Wheeler* v. *Abilene Nat. Bank Bldg. Co.*, 89 C. C. A. 482.

CORPORATIONS 184—STOCK CONTROL BY ANOTHER CORPORATION—RIGHTS OF MINORITY STOCKHOLDERS.—A railroad company, which through stock ownership controls another company, stands in a fiduciary relationship to the minority stockholders, and cannot lawfully sell to the controlled company a line of road built and owned by itself, the chief purpose of which is to benefit its own business, and not that of the controlled company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 692; Dec. Dig. 184.]

CORPORATIONS 156—STOCKHOLDERS—RIGHT TO DIVIDENDS.—The mere fact that a railroad company has earned net profits in a designated year does not entitle preferred stockholders to dividends therefrom, regardless of the needs of the company in the way of maintenance and betterments, to enable it to properly perform its duty to the public.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581–588, 598–608; Dec. Dig. 156.]

Appeal from the District Court of the United States for the District of Nebraska; W. H. Munger and Thomas C. Munger, judges.

Suit in equity by Charles A. Frank and others against the Union Pacific Railroad Company and others. Decree for complainants, and both parties appeal. Reversed.

Syllabus.

and into such number of parts of separate and distinct ownership as may be necessary to establish competitive [525] conditions and bring about a new condition in harmony with law; and the defendants shall file with the clerk within 90 days from the entry of this decree a plan for such separation and division for the consideration of this court. In the event this case is appealed and the decree superseded within 60 days from the entry thereof, the time within which the defendants shall file said plan is hereby extended to 60 days from the filing of the mandate of the Supreme Court with the clerk of this court. Jurisdiction is retained by the court to make such additional orders or decrees as may be necessary to carry this decree into effect.

"(4) Inasmuch as trade in cinematograph film and foreign trade in photographic supplies are not covered by the petition herein of the United States of America, no decree in regard to such subjects is made herein, but without renouncing the power and duty of this court to deal with all the property and business of every character of the corporate defendants in effecting the abrogation of the monopoly herein adjudged illegal.

"(5) Nothing in this decree contained shall prevent the defendants, or any of them, from the institution, prosecution, or defense of any suit, action, or proceeding involving any of their property or rights.

"(6) The petitioner shall recover from the defendants the costs of this suit, to be duly taxed herein.

"(7) The injunction granted by the second sub-division of this decree shall take effect 60 days after the entry of this decree, in case no appeal is taken from it. If an appeal be taken, and the decree be superseded, its operations shall be suspended until such time as shall be fixed in the final decree of this court entered on the mandate of the Supreme Court."

UNION PAC. R. CO. ET AL. v. FRANK ET AL.

FRANK ET AL. v. UNION PAC. R. CO. ET AL.

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MONOPOLIES 24—ANTI-TRUST ACT—SUITS FOR VIOLATION—WHO MAY MAINTAIN.—A private individual may not maintain an action to enforce generally the provisions of Sherm-
2, 1890, c. 647, 26 Stat. 209; but, in order to
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Opinion of the Court.

St. Joe, and the control of the property, affairs, and business of the latter, which had been and was being exercised by the Union Pacific by virtue of such stock ownership, were in violation of the inhibitions of the Sherman Act. It was further adjudged that the Union Pacific and the St. Joe be permanently and perpetually enjoined and restrained, the said Union Pacific from directly or indirectly voting or attempting to vote any shares of the stock owned, held, or controlled by it in the St. Joe, at any meeting of the stockholders of the St. Joe, and the St. Joe from permitting or suffering such shares of stock so voted, held, or controlled by the Union Pacific to be voted at any such meeting; that the Union Pacific be enjoined and restrained from exercising or attempting to exercise any control, direction, or supervision whatsoever over the acts or doings of the St. Joe by virtue of its ownership or control of any of the shares of stock of the St. Joe; that the said St. Joe be enjoined and restrained from permitting or suffering the Union Pacific to exercise any control, direction, or supervision whatsoever over the corporate acts of the St. Joe; that the said St. Joe be enjoined and restrained from paying any dividends to the said Union Pacific on account of shares of stock of the St. Joe owned, held, or controlled by said Union Pacific until the further order of [908] the court; that said Union Pacific be enjoined and restrained from collecting or receiving any such dividends on such shares of stock; that the St. Joe be permanently and perpetually enjoined and restrained from using any of its funds, moneys, property, credit, or earnings for the benefit, or in the interest, or to further the purposes or business of the Union Pacific, or otherwise than for the management, maintenance, and equipment of the St. Joe as an entirety, and solely for the need of its legitimate business, and from making any further expenditures for the reconstruction of that portion of the line of said St. Joe, lying between Upland, Kans., and Hastings, Nebr., and from purchasing, acquiring, or leasing the railroad of the Hastings & Northwestern Company, or any part thereof, which extends from the tracks of the St. Joe at Hastings, Nebr., to the tracks of the Union Pacific, at or near Gibbon, Nebr.,

except existing terminal and depot arrangements at Hastings, which were permitted to continue until the further order of the court, until a board of directors, chosen by the stockholders, other than the Union Pacific, should authorize such expenditures heretofore mentioned in the decree. It was further adjudged that unless, within 60 days after the entry of the decree, the management and control of the St. Joe should be surrendered to a board of directors chosen by holders of stock of said company, other than stock held or owned directly or indirectly by the Union Pacific, that a receiver of said St. Joe and of all its property and franchises should be appointed by the court, with the usual powers and duties of receivers in such cases.

[1] The far-reaching scope and extent of this decree suggests at once a careful examination of the law and the facts upon which it is based. The Union Pacific and St. Joe appealed generally. The complainants appealed, in so far as the court failed, omitted, and refused to hold and decree that the control by the Union Pacific of the property, business, and affairs of the St. Joe had been and was in violation of the fiduciary obligation owing by said Union Pacific as controlling stockholder of the St. Joe, and in so far as the court failed, omitted, and refused to hold and decree that the proposed reconstruction of the Upland-Hastings portion of the St. Joe, as described in the petition and shown by the proofs, and the proposed acquisition of the so-called Gibbon cut-off were ultra vires and beyond the corporate powers of the St. Joe, and in so far as the decree failed, omitted, and refused to require the Union Pacific to account for and pay over to the St. Joe all moneys, whether paid out of surplus or current earnings, expended in the reconstruction of the Upland-Hastings portion of the St. Joe, and all moneys expended by said St. Joe for the benefit of said Union Pacific and not required to be expended for the legitimate needs of the St. Joe, and all losses sustained by the St. Joe, owing to the control and management of its affairs by the Union Pacific.

The complainants are minority holders of first and second preferred stock of the St. Joe, and bring this action

St. Joe, and the control of the property, affairs, and business of the latter, which had been and was being exercised by the Union Pacific by virtue of such stock ownership, were in violation of the inhibitions of the Sherman Act. It was further adjudged that the Union Pacific and the St. Joe be permanently and perpetually enjoined and restrained, the said Union Pacific from directly or indirectly voting or attempting to vote any shares of the stock owned, held, or controlled by it in the St. Joe, at any meeting of the stockholders of the St. Joe, and the St. Joe from permitting or suffering such shares of stock so voted, held, or controlled by the Union Pacific to be voted at any such meeting; that the Union Pacific be enjoined and restrained from exercising or attempting to exercise any control, direction, or supervision whatsoever over the acts or doings of the St. Joe by virtue of its ownership or control of any of the shares of stock of the St. Joe; that the said St. Joe be enjoined and restrained from permitting or suffering the Union Pacific to exercise any control, direction, or supervision whatsoever over the corporate acts of the St. Joe; that the said St. Joe be enjoined and restrained from paying any dividends to the said Union Pacific on account of shares of stock of the St. Joe owned, held, or controlled by said Union Pacific until the further order of [908] the court; that said Union Pacific be enjoined and restrained from collecting or receiving any such dividends on such shares of stock; that the St. Joe be permanently and perpetually enjoined and restrained from using any of its funds, moneys, property, credit, or earnings for the benefit, or in the interest, or to further the purposes or business of the Union Pacific, or otherwise than for the management, maintenance, and equipment of the St. Joe as an entirety, and solely for the need of its legitimate business, and from making any further expenditures for the reconstruction of that portion of the line of said St. Joe, lying between Upland, Kans., and Hastings, Nebr., and from purchasing, acquiring, or leasing the railroad of the Hastings & Northwestern Company, or any part thereof, which extends from the tracks of the St. Joe at Hastings, Nebr., to the tracks of the Union Pacific, at or near Gibbon, Nebr.,

Opinion of the Court.

and restrain such violations of the Anti-Trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States, under the fourth section of the act, by district attorneys of the United States, acting under the direction of the Attorney General, thus securing the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan operative throughout the entire country. Possibly the thought of Congress was that by such a limitation upon suits in equity of a general nature to restrain violations of the act, irrespective of any direct injury sustained by particular persons or corporations, interstate and international trade and commerce, and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought on all sides and in every direction to accomplish improper or speculative purposes."

See, also, *Pidcock* v. *Harrington* (C. C.) 64 Fed. 821; *Southern Indiana Express Co.* v. *U. S. Express Co.* (C. C.) 88 Fed. 659; *Metcalf* v. *American School Furniture Co.* (C. C.) 108 Fed. 909; *G., C. & S. F. R. Co.* v. *Miami S. S. Co.*, 86 Fed. 407, 30 C. C. A. 142; *Rogers* v. *Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 33 C. C. A. 517; *Bigelow* v. *Calumet & Hecla Mining Co.* (C. C.) 155 Fed. 869.

[910] We think whatever doubt may have existed upon the subject has been removed by the decision of the Supreme Court in the case of *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520, handed down on February 23, 1915. It was there said:

"In the second place, the proposition is repugnant to the Anti-Trust act. Beyond question, re-expressing what was ancient or existing and embodying that which it was deemed wise to newly enact, the Anti-Trust act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. *Standard Oil Co.* v. *United States*, 221 U. S. 1 [31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734]; *United States* v. *American Tobacco Co.*, 221 U. S. 106 [31 Sup. Ct. 632, 55 L. Ed. 663]. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent, not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute,

Opinion of the Court.

but the remedies which it provided, were co-extensive with such conceptions. Thus the statute expressly cast upon the Attorney General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts under his authority and direction to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the Circuit Court of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and to exert such remedies as would fully accomplish the purposes intended. Act of July 2, 1890, c. 647, 26 Stat. 209.

"It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' *Farmers & Mechanics' National Bank* v. *Dearing*, 91 U. S., 29, 35 [23 L. Ed., 196] *Barnet* v. *National Bank*, 98 U. S., 555 [25 L. Ed., 212]; *Oates* v. *National Bank*, 100 U. S., 239 [25 L. Ed., 580]; *Stephens* v. *Monongahela Bank*, 111 U. S., 197 [4 Sup. Ct., 336, 28 L. Ed., 399]; *Tenn. Coal Co.* v. *George*, 233 U. S. 354, 359 [34 Sup. Ct., 587, 58 L. Ed., 997]. Second, because of the destruction of the powers conferred by the statute and the frustration of the remedies which it creates which would obviously result from admitting the right of an individual as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract to assert that the corporation or combination suing, had no legal existence in contemplation of the Anti-Trust act. This is apparent since the power given by the statute to the Attorney General is inconsistent with the existence of the right of an individual to independently act since the purpose of the statute was, where a combination or organization was found to be illegally existing, to put an end to such illegal existence for all purposes and thus protect the whole public—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale and yet be held to be civilly dead for the purpose of recovering the price of such sale, and then by a failure to provide against its future exertion of power be recognized as virtually resurrected and in possession of authority to violate the law. And in a twofold sense these considerations so clearly demonstrate the conflict between the statute and the right now asserted under it as to ren[**911**]der it unnecessary to pursue that

subject further. In the first place, because they show, in addition, how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States—a jurisdiction evidently given, as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting from such finding. In the second place, because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale, but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility, and not to leave it to individual action prompted, it may be, by purely selfish motives."

While the case cited is not parallel to the case at bar, still the reasoning and language of the Supreme Court leaves no doubt that it is the opinion of the Supreme Court that private individuals may not maintain an action to enforce the provisions of the Sherman Act generally, but that in order to rely upon its provisions an individual must base his cause of action upon its violation, and show a special damage to himself arising from such violation, not suffered by the general public.

We are not unmindful of act of Cong. Oct. 15, 1914, c. 323, 38 Stat. 737, which in section 16 gives any person, firm, corporation, or association the right to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage by violation of the Anti-Trust laws. Whether this law could be appealed to by complainants in the present action may be doubted, as it was not passed until after the final decree was rendered in this action, and it has no retroactive effect. Conceding, however, that it might be made applicable to this action, it does not change the rule already established by the decisions of the courts, as the right to sue by a private party is only given to obtain injunctive relief against threatened loss or damage. So that, if the law could be applied in the present action, it still remains true that loss or damage to the complainants must be shown. The conclusion thus arrived at makes it apparent that the decree below has

no basis of law or fact upon which to rest, as the trial court found only that the control of the St. Joe by the Union Pacific, through stock ownership, was in violation of the Sherman Act and based its decree entirely upon this finding, declaring in its opinion that, having so found, it was unnecessary to decide the other issues presented by the pleadings and proofs. The question as to whether the Union Pacific as a majority stockholder had violated its duty toward the complainants in the manner alleged in the bill, and thereby caused damage to them, was in no wise considered. The failure of the court below to pass upon these questions caused complainants to appeal, and they assign this failure of the trial court as error. As the right of the complainants, therefore, to any relief depends upon how their appeal shall be determined, we proceed to consider the matters arising thereon.

[2] The specifications in the appeal present two general questions for determination: (1) Has the control of the St. Joe by the Union Pacific been exercised in violation of the fiduciary obligations owing by the Union Pacific to the minority stockholders of the St. Joe? (2) If [912] so, has such control damaged complainants? The facts bearing upon these questions are substantially as follows: The Union Pacific is a corporation organized on July 1, 1897, under and pursuant to an act of the Legislature of the State of Utah, approved January 22, 1897 (Rev. St. Utah 1898, c. 7), and since its organization has been engaged in operating a system of railroads extending from Council Bluffs, Iowa, to Ogden, Utah; from Kansas City, Missouri, to Denver, Colo.; and from Denver to a connection with its main line at Cheyenne, Wyo. Through the ownership of capital stock it has established close traffic relations with railroads which, in connection with its own and under joint management, constitute continuous lines extending from Council Bluffs, Iowa, and Kansas City, Mo., to various termini on the Pacific coast.

The St. Joe is, and since 1897 has been, a railway organized and existing under and pursuant to the laws of Kansas and Nebraska, being a consolidation of the St. Joseph, Han-

over & Western Railway Company and the Grand Island, Hastings & Southeastern Railroad Company. Its line of road extends from St. Joseph, Mo., to Grand Island, Nebr., a town on the main line of the Union Pacific, and at the time of the commencement and hearing of this case in the court below had and exercised trackage rights over other lines of railway from St. Joseph, Mo., to Kansas City, Mo. The outstanding securities of the immediate predecessor of the St. Joe at the time of its failure in 1893 and reorganization in 1896 were as follows:

First-mortgage 6 per cent bonds	$7,000,000
Second-mortgage income bonds	1,680,000
Common stock, par value	4,600,000
Total capitalization	13,280,000

The reorganization plan, pursuant to which the railroad was formed in 1897, provided for the issuance of new securities with a face value of $17,600,000, divided as follows:

First-mortgage bonds, to bear interest at 2 per cent for two years, 3 per cent for three years, and 4 per cent thereafter, the issuance of an additional $1,000,000 being authorized, but only to pay for new trackage at a rate not to exceed $6,000 per mile	$4,000,000
First preferred 5 per cent stock (non-cumulative)	5,500,000
Second preferred 4 per cent stock (non-cumulative)	3,500,000
Common stock	4,600,000
Total new capitalization	17,600,000

Under the plan of reorganization the holders of the old first-mortgage bonds received 50 per cent face value of their bonds in secured bonds of the new company and 95 per cent in new first and second preferred stock, or a total of 145 per cent of their prior holdings. The holders of the old second mortgage income bonds received 100 per cent in preferred stock and 12 per cent in first preferred stock, on paying an assessment of 6 per cent. The holders of the old stock received an equivalent amount at par in new common stock and 6 per cent in first preferred stock, on payment of a 3 per cent assessment. It thus appears that for the securities of an insolvent company of the par value [913] of $13,280,000, supplemented by the payment of $238,800 cash new securities to the amount of $17,600,000 were issued.

Charles A. Frank & Co. purchased their shares in 1902 and the other complainants in 1904, 1906, and 1908. It does not appear in the evidence that any of the complainants were owners of any of the bonds of the old company, and, as no dividends have been paid since 1902, it results that most of the complainants bought their stock after the St. Joe had ceased to pay dividends. The plan of reorganization further provided for the creation of a voting trust to manage the new company and retain control thereof for the benefit of the first preferred stock for five years, unless such stock should pay full dividends for three consecutive years. At the expiration of the voting trust, all stock was to have full and adequate voting power. It was during the continuance of the voting trust that dividends were paid as follows: The first preferred stock received 5 per cent dividends in each of the years 1898, 1901, and 1902, and 3 per cent in each of the years 1899 and 1900, and nothing since 1902. The second preferred stock has never received dividends. Mr. Harriman, through stock ownership, controlled the St. Joe from 1903 to 1906. In July, 1906, the Union Pacific acquired the Harriman stock, and thereafter exercised control of the St. Joe. On November 26, 1913, the Union Pacific owned 70.81 per cent of the total outstanding stock. It is alleged in the answer of the St. Joe that the money for paying dividends during the time the voting trust was in charge was obtained by neglecting the upkeep of the road, and the evidence in the record seems to establish this allegation. It appears from the evidence that from 1897 to 1902, inclusive, covering the time of the control of the voting trust, the expenditures for maintenance of way averaged yearly $714 per mile, or an annual charge of $127,894 for the 257 miles. Between 1902 and 1913 the yearly average per mile for maintenance of way was $1,142, or $307,198 for the whole line, making an average difference of $127,984. In 1901, when a full dividend was paid, the charge for maintenance was only $588 per mile. The average yearly expenditure per mile for maintenance or equipment between 1897 and 1902, when dividends were paid, was $423 per mile, or an annual expenditure on the entire line of $106,173. Between 1903 and 1913 the yearly average

Opinion of the Court.

per mile was $867, or for the entire line of $339,386, a difference of $224,360 per annum between the two periods for cost of maintenance and equipment. In the five years ending 1902, covering the management in the interest of the preferred stock, the average yearly outlay for additions and betterments was $25,032, while in the period from 1903 to 1911 it was $77,761. If $230,000 is deducted as the cost of the Highland extension, still the average disbursement after 1903 is $28,475 more than the yearly average while dividends were being paid. The capital charges for equipment were at the rate of $46,358 per year up to 1902, and after 1902 at the rate of $82,232, a difference of $35,874 in favor of the second period. These figures show a difference in expenditure for the St. Joe amounting in the aggregate to $313,387 per annum, which would fully account for the dividends of $274,855 per annum paid on the first preferred stock during the period when the road was being managed under the voting trust for the benefit of [964] the preferred stockholders. The following table shows the gross and net earnings of the St. Joe Company from 1896 to 1912:

Year.	[illegible]	[illegible]	Year.	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

The increase of gross receipts since 1903 as shown by this table averages $222,288 more per annum than under the management of the voting trust. At this point we think it may be truly said that, conceding that Harriman from 1902 to 1908 and the Union Pacific since that time controlled the management of the St. Joe through stock ownership, the management, so far as income is concerned, was better than the management under the voting trust. The serious charge made by complainants is the conduct of the controlling management in the use of the moneys of the

Opinion of the Court.

St. Joe, and we will now proceed to consider the evidence in regard to these charges.

One of the instances in which the Union Pacific is alleged to have abused its fiduciary relation of majority stockholder is in relation to the expenditures in the reconstruction of the Carden-Hastings division of the St. Joe. In the evidence and in the decree this division of the road is sometimes called the Upland-Hastings division, and sometimes the Carden-Hastings division; but we understand that Carden and Upland are one mile apart, on the St. Joe near Marysville, Kans. It is charged that when the Union Pacific secured control of the majority of the St. Joe stock, it entered upon plans to reconstruct the line of the St. Joe road extending from Carden to Hastings, a distance of 118 miles; that this development was not for the benefit of the St. Joe road, but entirely for the use and benefit of the Union Pacific in connection with the plan of the Union Pacific to use this part of the St. Joe line as a part of its line from Kansas City, Mo., via Marysville, Kans., to a point on the main line of the Union Pacific near Kearney, Nebr. It is charged that this portion of the St. Joe line was developed to a high degree and up to the Union Pacific's main-line standards; the only difference being in the weight of the rail. The cost of the reconstruction, so far as it proceeded up to March, 1911, is estimated at $1,250,000.

It is claimed that the board of directors of the St. Joe road, controlled by the Union Pacific, unlawfully took this amount of money from the surplus earnings of the St. Joe to develop the Carden-Hastings branch for the benefit of the Union Pacific, and that said improvements [915] were not necessary for the use of the St. Joe. It appears that the St. Joe road had on June 30, 1909, a cash balance of $1,056,839.71. This balance was exhausted in improvements, largely in the reconstruction between Carden and Hastings. The expenditures for improvements not only exhausted this surplus, but exhausted the amount of available current earnings, resulting in deficits as follows: 1910, $260,273; 1911, $119,167; 1912, $207,456. On this state of facts the question arises as to whether the expenditure of

money for the Carden-Hastings reconstruction was unlawful or fraudulent in such a sense as to warrant the finding that the Union Pacific was guilty of a willful abuse of its power as controlling stockholder to the injury and damage of complainants.

To sustain the charge as to the wrongful conduct of the Union Pacific in causing the reconstruction of the Carden-Hastings division of the St. Joe, complainants produced as their only witness Robert Rantoul, who was employed by the so-called protective committee in March, 1911, to make an investigation of the St. Joe and its relations to the Union Pacific. The witness spent about a month in the West, going first to St. Louis, thence to Kansas City, Topeka, Marysville, and Grand Island. He inspected the St. Joe road from Hastings to Grand Island early in the morning from the rear end of a train going 20 or 25 miles per hour, and from Hastings to St. Joseph from the observation end of the private car of Mr. Stenger. He testified as follows: That the 60-pound rail taken up for the purpose of reconstructing the Carden-Hastings division was in very good condition; that 80-pound rails were laid in lieu thereof; that the division had been quite thoroughly retied, and that the work of ballasting with crushed rock had commenced at the time of his visit; that in a general way the work of reconstruction conformed very closely to Union Pacific standards employed in the construction of the Marysville cut-off; that there was some grade revision between Upland and Hastings at considerable expense; that the double track between Upland and Carden was not necessary for the business of the St. Joe; that there is no rock ballasting on the St. Joe, except between Upland and Hastings; that rock ballasting is not necessary for the business of the St. Joe; that the St. Joe established a rock quarry at Marysville, at a cost of $39,000; that this was not necessary; that the plans for ballasting called for eight inches of crushed rock under the ties; that one-third to one-half of the ties were new; that the reconstruction was not necessary for the business of the St. Joe; that there was a large steel bridge erected near Marysville as part of the reconstruction work; that

the contract price for three bridges in connection with the reconstruction work was $141,000; that the bridges were up to Union Pacific standards and were unnecessary for the business of the St. Joe; that the ballasting cost $2,700 per mile; that two new water tanks were constructed, which were unnecessary; that the St. Joe road, before the reconstruction between Upland and Hastings, with normal maintenance, was amply sufficient to take care of the current business of the St. Joe. Witness estimated cost of reconstruction at $1,250,000; that there had been no substantial improvements made east of Upland or between Hastings and Grand Island since 1907. On cross-examina[916]tion he testified that in 1903, 1904, and 1905 a large portion of the road east of Upland was relayed with 75 or 80 pound rails.

The reconstruction of the Carden-Hastings division of the St. Joe is not disputed, neither is the estimated cost thereof seriously disputed. The disputed question is, Were the funds of the St. Joe used in the reconstruction of the Carden-Hastings division for the benefit of the St. Joe or the Union Pacific? That the reconstruction work was unnecessary for the business of the St. Joe would be a fact bearing on the question at issue but not decisive thereof. If the reconstruction work was done in good faith and in the belief that it was beneficial to the St. Joe, complainants can not complain, though it should be found that the improvement was unnecessary for the use of the St. Joe. In other words, the court, in order to grant relief, must find that the Union Pacific, through its control of the directorate of the St. Joe, knowingly and dishonestly caused the funds of the St. Joe to be used for its own benefit. That the reconstruction of the Carden-Hastings division of the St. Joe was necessary for the business of the St. Joe, aside from any consideration of the business of the Union Pacific, is shown by the great preponderance of the evidence.

The testimony can not be detailed in this opinion: but we refer to the evidence of Mr. E. C. Hurd, a civil engineer of experience and at the time he examined the St. Joe road chief engineer in charge of the railroad valuations for the

Opinion of the Court.

railway commission of Nebraska; of Mr. C. H. Gerber, assistant engineer in the same employment; of Mr. Edward Lass, connected with the engineering department of the Chicago, Milwaukee & St. Paul Railway Company; of Mr. R. L. Huntley, chief engineer of the Union Pacific; and of Mr. William A. Parker, chief engineer of the St. Joe. The evidence of these witnesses was fully corroborated by practical railroad operators who were familiar with the property of the St. Joe, viz, J. Berlingett, formerly general manager of the St. Joe, now employed by the Virginia Railroad Company; Ernest Stenger, who succeeded Berlingett in 1911 as general manager of the St. Joe; and A. L. Mohler, president of the Union Pacific. The testimony of these engineers and practical railroad men, all eminent in their respective callings, may not be lightly laid aside. Giving their evidence the weight to which it is entitled, we must find that Mr. Rantoul was mistaken. The facts which give rise to the charge that the reconstruction work was done in the interest of the Union Pacific are stated in complainants' bill as follows:

"Thirteenth. The main line of the Union Pacific, extending from Kansas City, Topeka, and Salina, through the State of Kansas to Denver, Colorado, and Cheyenne, Wyoming, and thence west, has been and is, by reason of heavy grades and a circuitous route and other physical difficulties, incapable of development for heavy through traffic to the extent and degree desired by the Union Pacific, so much so that the efficiency of locomotives west of Salina is only about 50 per cent of their hauling capacity east of Salina, and even less than that between Denver and Cheyenne. Said Union Pacific has, during the past seven or eight years, been engaged, as aforesaid, in constructing and developing a more direct, suitable, and efficient line of railway west of Topeka. To that end the Union Pacific, in June, 1904, caused the Topeka & Northwestern Railroad Company, a subsidiary corporation, to be organized under the laws of Kansas, for the purpose of building a line of railway from the vicinity of Topeka, in a northwesterly direction, to the vicinity of Marys[917]ville, Kansas, with an authorized issue of 6 per cent bonds to the amount of three million dollars ($3,000,000), or more than forty thousand dollars ($40,000) per mile, for the construction of a line of railway about seventy (70) miles in length, which was an usually large sum per mile for the construction in a prairie country of a railway needing no equipment and having no expensive terminals. The construction of said seventy (70) miles of railway was begun in 1904, leaving the

Kansas City main line of the Union Pacific at Menoken, five (5) miles west of Topeka, extending thence to Onaga, and there intersecting another line of the Union Pacific running from Leavenworth to Miltonvale, Kansas, and thence to a connection with the main line of the St. Joe Company, one mile east of Carden, Kansas, where a new station called Upland was established. The construction of said Topeka & Northwestern line was largely completed, with the exception of rock ballasting, in 1910, the tracks of the St. Joe Company being used from Upland to Marysville, a distance of five miles, thus connecting the main line of the Union Pacific near Topeka, and the Leavenworth-Miltonvale line with the main line of the St. Joe Company, affording a direct, suitable, and efficient route from Kansas City, Leavenworth, and Topeka over the so-called 'Marysville cut-off' to Upland, and thence by means of the tracks of the St. Joe Company to Hastings, Nebraska. * * * Said Topeka & Northwestern Railroad Company was in or about 1908 absorbed by the Union Pacific, which took over all the properties of said subsidiary company, and has ever since owned said line of railway and all its properties."

The facts stated in the foregoing allegation of the bill, so far as they are material to the present inquiry, are practically admitted by the Union Pacific and St. Joe. It is conceded that as a business proposition the action of the Union Pacific as above set forth was a wise decision for the Union Pacific, as it shortened the distance for through traffic from the West to Kansas City about 100 miles, and would make a considerable saving in cost of operation. It is admitted that the Union Pacific intended that through traffic from the West should be hauled over the line of the St. Joe between Carden and Hastings, or Marysville and Hastings, which is practically the same thing; not that the Union Pacific intended to operate with its own engines, trains, and cars this portion of the St. Joe, but that it should be operated by the St. Joe Company with its own engines, trains, and cars under some traffic arrangement. When Mr. Rantoul testified that the reconstruction of the Carden-Hastings division of the St. Joe was unnecessary for the business of that company, he also testified on cross-examination as follows:

"Would you call the St. Joseph & Grand Island a branch line? A. Yes; I should, taking the nature of its traffic into consideration. Its volume of traffic, I should not call it a trunk line. Q. When you say that, what do you mean by that? A. I mean the preponderance

of its business is such as originates or is destined to points on its own line, that the volume or density of traffic is light, comparatively, and the character of the service is much similar to that which is rendered on branch lines."

It thus appears that the testimony of Mr. Rantoul, in speaking of the business of the St. Joe, referred to simply local traffic originating and ending at points on the St. Joe. There is no question made but that the reconstruction of the Carden-Hastings division was necessary in order to handle properly the traffic which the Union Pacific would throw to the St. Joe by reason of the establishment of the new route by the Marysville cut-off. It appears from testimony in the record that the business to come to the St. Joe by reason of a part of its line [918] being used as part of a through route to the West from Kansas City would be profitable and remunerative. Mr. Rantoul on cross-examination testified that, if the St. Joe should obtain a fair and liberal division of rates, he would regard the tonnage referred to as a very desirable addition to the St. Joe business, and that, if the contract between the Union Pacific and the St. Joe was sufficiently binding, so as to secure a continuance of the tonnage in the future, the St. Joe would be entirely justified in making the expenditures caused by the reconstruction of the Carden and Hastings division. It appears from the evidence that the following contract became operative between the parties thereto on the date specified therein:

"(1) The Grand Island Company will 'bridge' Union Pacific freight traffic between Marysville, Kansas, and Hastings, Nebraska, for five cents per hundred in carload lots and seven cents in less than carloads, regardless of classification. By Union Pacific traffic is meant that between points west of Hastings, on the one hand, and east, north, or south of Marysville, on the other, which the Union Pacific may tender the Grand Island Company for transportation; the intent being to use the 'bridge' to the greatest extent practicable.

"(2) Should any case arise where the through rates obtainable will not admit of the above allowances, such cases may be considered from time to time on their merits and special division arrangements made to cover.

"(3) The Grand Island Company will promptly handle the traffic when tendered, the idea being to make the through service continuous and prompt; it being recognized that this is absolutely necessary in

order to meet competitive conditions and to develop the traffic to a maximum.

"(4) The allowances provided for in the first paragraph of this agreement shall not apply to business originating at or destined to points between Marysville and Hastings.

"(5) Whenever it is deemed advantageous by both parties to install through passenger service, the details and basis of division shall be as may be agreed upon from time to time, so as to afford due compensation to the Grand Island Company for the service rendered and the facilities supplied by it.

"(6) This arrangement shall take effect October 27, 1913, and be subject to cancellation on sixty (60) days' notice by either party to the other.

"Dated October 14, 1913."

At the time of the hearing in the court below the through line via Marysville and Hastings had been in operation about two months, and the evidence shows that the additional revenue of the St. Joe had grown to $1,000 per day, or at the rate of approximately $365,000 per annum. This is in excess of the estimates made by witnesses before the line was opened, it being the opinion of witnesses that the increase would be about $210,000 per annum. Mr. Stenger testified that any freight that the St. Joe would get in addition to what it was already handling would be clear gain. In any aspect of the case we must find that the traffic is beneficial to the St. Joe. It is also apparent that this reconstruction work can not be said to have been performed for the Union Pacific alone at the expense of the St. Joe, and therefore its appearance was not ultra vires. If the St. Joe management believed in good faith that this additional traffic from the West, which formerly was going by the way of Denver, would be advantageous for the St. Joe, they had the authority and were justified in making the improvements required to handle the traffic. On the record as it stands, we can not find that any legal damage has resulted to the complainants by the recon[919]struction of the Carden-Hastings division. We are also of the opinion, after a consideration of the evidence, that owing to the strong competition of the Chicago, Burlington & Quincy Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Missouri Pacific Railway Company, and the Atchison, Topeka & Santa Fé Railway Company, the St. Joe is largely dependent upon the

Union Pacific for much of its revenue. The railroad lines above mentioned are all competitors, both of the St. Joe and the Union Pacific, and, the latter having no line of its own running to St. Joseph, a very important shipping point, the situation seems to be one which calls for mutual exchange of traffic.

In regard to the refunding mortgage, it appears that proceedings were abandoned in regard to it on the commencement of this litigation, and we see nothing at present which would require any consideration thereof by the court.

[3] We come now to consider the proposed purchase of the line of railroad extending from Hastings to Gibbon, a distance of 26 miles. It was alleged in the original bill that it was the intention of the St. Joe, dominated by the Union Pacific, to build a line of railroad from Hastings to a point on the Union Pacific near Kearney, Nebr., at a cost of more than $1,275,000, and it was asked that this action upon the part of the St. Joe be restrained as ultra vires. In the supplemental bill it was alleged, referring to the allegation in the original bill, that upon information and belief the St. Joe and Union Pacific had abandoned the plan of building a road between the points mentioned, but instead thereof intended to accomplish the same object by the following means:

"The Union Pacific has caused a new corporation, known as the Hastings & Northwestern Railway Company, to be incorporated under the laws of Nebraska, for the purpose of constructing said line between Hastings and Gibbon, and the contract for the said construction has been let to a firm of contractors, who are about to begin the construction. Your orators charge that it is the intention of the defendants, after the completion of the new line, to cause it to be purchased by the St. Joe Company out of the proceeds of the aforesaid contemplated bond issue, either by the purchase of the physical property or by the acquisition of the securities of the new company. Your orators aver that the sole purpose of making the connection between the main line of the St. Joe Company and the main line of the Union Pacific is to shorten the haul of Union Pacific through traffic, and that no such connection is necessary or expedient for the legitimate purposes of the St. Joe Company or the handling of its own traffic, and that the acquisition of the connecting line by the St. Joe Company would be illegal and ultra vires, precisely to the same extent and for the same reasons as were fully set forth in the original bill."

The line has in fact been built by the Union Pacific, and we think it may fairly be said that the St. Joe, dominated by the Union Pacific, intends to purchase this line of road from the Union Pacific for the cost thereof estimated at $1,-300,000. It is admitted that the line is now owned by the latter company. A careful examination of the articles of incorporation of the Grand Island, Hastings & Southeastern Railroad Company and of the St. Joseph, Hanover & Western Railroad Company, and the articles of consolidation between said railway companies, and which consolidation formed the present St. Joe, convinces us that the St. Joe has no express or implied power to purchase any railroad, **[920]** except that described in the articles of incorporation of the two companies which were consolidated. These articles of incorporation specify distinctly just what railroad and parts of railroad the respective railway corporations shall have authority to acquire and use, and there is no railroad described, except the present line of the St. Joe extending from Grand Island, Nebr., to St. Joseph, Mo. Moreover, there is great force in the contention, in regard to the line of road built by the Union Pacific from Hastings to Gibbon, that its chief purpose is for the benefit of the Union Pacific. Again, as the Union Pacific dominates the control of the St. Joe, the purchase by the St. Joe of the Gibbon extension under such circumstances should be viewed with careful scrutiny, and, in our opinion, ought not to be permitted. The duty owing by the owners of a majority of the stock of a corporation toward minority stockholders has never been stated with more force or clearness than by Judge Sanborn in the case of *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 75 C. C. A. 631. The following paragraph from the opinion in that case is applicable here.

"A combination of the holders of a majority or of three-fifths of the stock of a corporation to elect directors, to dictate their acts and the acts of the corporation for the purpose of carrying out a predetermined plan, places the holders of such stock in the shoes of the corporation, and constitutes them actual, if not technical, trustees for the holders of the minority of the stock. The devolution of power imposes correlative duty. The members of such a combination become in practical effect the corporation itself, because they draw to themselves and use the powers of the corporation. In a sale of its property, in a con-

solidation of the corporation with another, in every act and contract of the corporation which they cause, they make themselves the trustees and agents of the holders of the minority of the stock, because it is only through them that the latter may act or contract regarding the corporate property or preserve or protect their interests in it. Such a majority of the holders of stock owe to the minority the duty to exercise good faith, care, and diligence to make the property of the corporation in their charge produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and deliver to them their just proportion of the income and of the proceeds of the property. Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property, to deprive the minority holders of their just share of it, or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust, which invokes plenary relief from a court of chancery. *Jackson v. Ludeling*, 21 Wall. 616, 622 [22 L. Ed. 492]; *Menier v. Hooper's Telegraph Works*, 9 Ch. App. Cas. 350, 352, 353; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169, 182, 183 [98 Am. Dec. 95]; *Ervin v. Oregon Ry. & Nav. Co.* (C. C.) 20 Fed. 577, 580; Id. [C. C.] 27 Fed. 625, 632; 2 Story's Eq. Jur. §§ 1261, 1262; *Sage v. Culver*, 147 N. Y. 241, 247, 41 N. E. 513; *Gamble v. Q. C. W. Co.*, 123 N. Y. 91, 99, 25 N. E. 201 [9 L. R. A. 527]; *Farmers' Loan & Trust Co. v. N. Y., etc., R. R. Co.*, 150 N. Y. 410, 425, 430, 44 N. E. 1043 [34 L. R. A. 76, 55 Am. St. Rep. 689]; *Hinds v. Fishkill, etc., Gas Co.*, [96 App. Div. 14], 88 N. Y. Supp. 954, 957; *Meeker v. Winthrop Iron Co.* (C. C.) 17 Fed. 48; *Sidell v. Missouri Pac. R. Co.*, 78 Fed. 724, 727 [24 C. C. A. 216]; *Barr v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 444, 449, 451, 456; *Wright v. Oroville M. Co.*, 40 Cal. 20, 27; *Pondir v. N. Y., L. E. & W. R. R. Co.*, 72 Hun., 384, 390, 25 N. Y. Supp. 560; *Gregory v. Patchett*, 33 Beavan, 595."

See, also, an opinion by the same judge in *Union Pacific Ry. Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 51 Fed. 309, 2 C. C. A. 174.

[4] It is probable that the non-payment of dividends upon the stock [**921**] held by complainants is a moving cause of this litigation. In the case of *New York, Lake Erie & Western Railroad Co. v. Nickals*, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363, it was held that a mere statement and accumulation of net profits during a designated period did not amount to the ascertainment that dividends were due stockholders or to the declaration of such dividends. At 119 U. S. 306, 7 Sup. Ct. 214 (30 L. Ed. 363), the court said:

"A different view would lead to results which sound policy would seem to forbid, and which, therefore, it is not to be supposed were

contemplated by the parties. For, if preferred stockholders become entitled to dividends upon a mere ascertainment of profits for a particular year, the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight would be subordinate to their right to payment out of the funds remaining on hand after meeting current expenses and fixed charges. Indeed, there is some ground to contend that, according to appellees' interpretation of the charter, the directors were not at liberty in any year when the current receipts were in excess of operating expenses, to pay even interest on funded debt, or rentals of leased lines, before paying a dividend on preferred stock. We are of opinion that, while the agreement of 1877 and the articles of association sustain the claim of preferred stockholders to a 6 per cent dividend in advance of common stockholders, the former are not entitled of right to dividends payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging in the first instance to the directors to determine, with reference to the condition of the company's property and affairs as a whole. As the evidence shows that the profits for the year ending September 30, 1880, were applied to objects that were legitimate and proper, and as the condition of the company was not such as to make the declaration of a dividend a duty upon the part of the directors, we perceive no ground upon which the claim of the appellees can be sustained."

See also *St. John* v. *Erie Railway Co.*, 21 Wall. 136, 22 L. Ed. 743; *Union Pacific Railroad Co.* v. *United States*, 99 U. S. 402, 25 L. Ed. 274; *Park* v. *Grant Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162; *Gibbons* v. *Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; *D'Ooge* v. *Leeds*, 176 Mass. 558, 57 N. E. 1025; 1 Cook on Corporations (6th Ed.) 272.

Our conclusion, after a careful examination of the whole record, is that as the right of the complainants to relief with reference to the purchase of the line of road extending from Hastings to Gibbon does not depend upon the fact of whether the Union Pacific's ownership of a majority of the stock of the St. Joe is in violation of the Sherman Act or not, and as this court has no authority in behalf of complainants to break up the combination existing between Union Pacific and St. Joe in violation of the Sherman Act, if any such combination exists, but only to grant relief in instances

Opinion of the Court.

SESSIONS, district judge.

[1] According to the allegations of the bill of complaint, plaintiff is the owner of three patents for improvement in button-setting machines and attachments thereto. It is, and for several years has been, manufacturing and leasing or licensing shoe button attaching machines constructed under its patents, and, in so doing is, and has been engaged in interstate commerce throughout the United States. Prior to the enactment of the Clayton Anti-Trust Act, so called, in October, 1914, plaintiff's machines were loaned or leased to users, including defendant, on the condition that only its wire should be used in their operation. Attached to each machine so loaned or leased was a metal plate bearing the following inscription:

"This machine is the property of the Elliott Machine Company and is loaned to and accepted by the user to use wire furnished under the company's trade-mark only."

No other agreement than that stated upon the plate was made with defendant or other users. Plaintiff's wire, the use of which was thus required, was put up in coils. Each coil contained a sufficient amount of wire for 1,000 operations of the machine, which was so constructed as to lock automatically upon the completion of each 1,000 operations. For that reason a key with which to unlock the machine was attached to each coil of wire. The wire and key were furnished by plaintiff to its customers for about 85 cents per coil, which included both the price of the wire and the royalty for the use of the patented machine to fasten 1,000 buttons.

Since October, 1914, plaintiff, believing that the further continuance and performance of its former contracts would be a violation of section 3 of the Clayton Act, has notified the users of its machine, including defendant, that they will no longer be required to purchase or use its wire, and that a royalty of 75 cents must be paid for the use of each machine to make 1,000 operations or to fasten 1,000 shoe buttons. Plaintiff has continued to manufacture wire, but sells the same, without the key, for 10 cents per coil, which is a fair price for the wire alone, without any royalty for the use of the machine.

Defendant has purchased wire from plaintiff's agents at 10 cents per coil, and has continued to use the patented machine, but has refused to pay the royalty demanded. This suit is brought to restrain further alleged infringement of plaintiff's patents and for the usual accounting. Defendant's motion to dismiss is founded primarily upon the claim that section 3 of the Clayton Act is not retroactive and can not [126] affect contracts, like the one here involved, made and entered into before its enactment.

One vice of defendant's contention lies in the fact that the contract between these parties does not constitute an irrevocable license to use the patented machine during the full period of the life of the patents, as claimed, but, at most, is a license which may be revoked by plaintiff or repudiated by defendant at any time when 1,000 operations of the machine have been completed for which a royalty has been paid. It is true that the notice or inscription upon the plate attached to the machine is silent as to both time and royalties, but the conduct of the parties in performing the contract shows clearly and conclusively that their mutual intention and agreement was that a royalty was to be included in the price of the wire, and that the right to use the machine was to be limited to the operations thereof for which such royalty had been paid. In terms, the contract is a loan and not a license. It follows, regardless of whether or not the specific transactions between these parties involved interstate commerce, that defendant's right to use plaintiff's machine could be terminated at the will of either party, and that defendant would be an infringer of plaintiff's patents if he continued to use the machine after his right so to do had been terminated.

[2] However, the principal question argued at the hearing of this motion to dismiss was that of the application and effect of the Clayton Act to and upon the contract between these parties, which was made and entered into prior to the congressional enactment. In the discussion of that question, counsel for both parties have assumed that the contract is single, and also that it is one which, if made at the present time, would fall within the ban of section 3 of the act.

Counsel for defendant earnestly insists that, even if Congress so intended, the statute can not be construed to apply to pre-existing contracts, and to prohibit their performance and enforcement, without violating fundamental and constitutional rights. The statute does not in terms except from its operation any agreements or contracts, past, present, or future, and, in the absence of such exception, it is to be presumed that Congress intended to prohibit not only the making of future contracts, but also the further performance of past contracts of the kind specified.

[3, 4] Congress derives its power to enact such legislation from the commerce clause of the Constitution, and the power so conferred is broad, comprehensive, and all embracing. All persons entering into contracts involving interstate commerce must do so subject to the right of Congress thereafter to control, regulate, or prohibit the performance thereof. "Every owner of property holds the same subject to such action as the sovereign power of the State may, in the exercise of its legitimate sovereignty, adopt in relation to it." It is now too well settled to admit of controversy that a contract to do a thing, lawful when made, may be avoided by subsequent legislation making it unlawful, and that an act of Congress may lawfully affect rights which had their inception before its passage. *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; *Phila., Balt. & Wash. R. R.* v. *Schu*[**127**]*bert*, 224 U. S. 603, 612, 613, 32 Sup. Ct. 589, 56 L. Ed. 911; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 228, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *Portland Ry. Co.* v. *Oregon R. R. Comm.*, 229 U. S. 397, 412, 413, 33 Sup. Ct. 820. 57 L. Ed. 1248; *Atlantic Coast Line R. Co.* v. *Finn*, 195 Fed. 685, 690, 117 C. C. A. 1; *Holt* v. *Henley*, 193 Fed. 1020, 1021, 113 C. C. A. 87.

[5] In the case made by the bill, which for the purposes of this motion must be accepted as true, defendant's claims are shown to be inequitable. He seeks to compel plaintiff to yield to him without consideration property for which he has fairly agreed to pay an adequate price. While courts would

Syllabus.

not refrain from declaring and applying legal principles, because peculiar hardships will result in isolated instances, they are not to be persuaded consciously to do injustice in violation of those principles.

The motion is denied.

H. B. MARIENELLI, LIMITED, v. UNITED BOOKING OFFICES OF AMERICA ET AL.

(District Court, S. D. New York. July 31, 1914.)

[227 Fed. Rep., 165.]

COMMERCE 43, 44—INTERSTATE COMMERCE—WHAT CONSTITUTES—THEATER BOOKING AGENCY.—Where vaudeville theaters were arranged in circuits, and it was the practice to book performers for the whole or part of one circuit under one contract, requiring them to pass from theater to theater and from State to State, taking with them certain paraphernalia and stage properties, certain aspects of the business of the theater owners and their booking agents constituted interstate commerce, as, for instance, the contracts under which the performers were to go from State to State, fulfilling their contracts as much by the travel as by the acting, the carriage of their stage properties and paraphernalia from one State to another, and the sending by the theaters themselves from State to State of scenery and advertising matter.[a]

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 32, 35; Dec. Dig. 43, 44.]

MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—Whether a combination causes a restraint of interstate commerce must be judged by the usual rule of legal responsibility; that is, whether the effect upon the interstate movement of goods or persons is within those consequences which would reasonably be supposed to result from the acts of the parties, but results insignificant in proportion to the total effect will be disregarded.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—A number of vaudeville theaters scattered over the United States were arranged into circuits, and it was the practice to book performers over the whole or part of one circuit under one contract, requiring them to pass from State to State, taking with them certain

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[a] Syllabus copyrighted, 1915, 1916, by West Publishing Company.

Syllabus.

paraphernalia and stage properties. The owners of such theaters and their booking agents entered into a combination or conspiracy in restraint of their own business, whereby the theater owners were not to employ performers not booked through booking agents, and the booking agents were not to act for any theater employing any other booking agent, or employing any performer who played outside such circuits or who had as a representative any person who had obtained employment for a performer outside such circuits. Any theater employing such a performer would be blacklisted and the booking agents would not act for it. *Held*, that the effect of a monopoly of such business upon interstate commerce was not so inconsiderable as not to come within the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209.)

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—That a State has power to tax a business is not determinative that a combination monopolizing such business is outside the Sherman Act; nor does it follow, because a combination is within the act, that the business may not be subject to a State tax.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

[166] MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—A combination may be within the Sherman Act, though concerned in great part with internal matters.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—In an action for damages caused to plaintiff by a combination in restraint of interstate commerce, it is immaterial whether the acts in pursuance of the combination which injured plaintiff were themselves acts of interstate commerce; the illegality arising from the project or plan as a whole.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 12—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—A combination between a number of vaudeville theaters and their booking agents, the purpose of which is to keep all first-class performers for such theaters, refuse to allow them to act if they act in other theaters, and refuse to allow other theaters to have their performers if they employ other performers, and refuse to deal with performers' agents who book such performers elsewhere, is in restraint of trade, where it is alleged that, outside of the circuits into which such theaters are arranged, first-class performers can not obtain sufficient employment in the United States and Canada to make a living, as the necessary inference is that, if successful, the parties to the combination will control all first-

class performers and monopolize the supply, and thus control the business.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 28—COMBINATIONS IN RESTRAINT OF TRADE—DAMAGES.—The damages sustained by a performer's agent blacklisted by the members of such combination were within the seventh section of the Sherman Act (Comp. St. 1913, § 8829), providing that any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by that act, may sue therefor and recover threefold the damages sustained.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

MONOPOLIES 28—COMBINATIONS IN RESTRAINT OF TRADE—ACTIONS—PARTIES.—In an action for damages caused by such combination all of the parties privy to the general plan were properly joined, though the execution of different parts of the plan was confined to individuals.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

At Law. Action by H. B. Marienelli, Limited, against the United Booking Offices of America and others. On demurrer to the complaint. Demurrer overruled.

This is a demurrer to a complaint at law for damages under the Sherman Act. Its general outline is as follows: The individual defendants collectively own many vaudeville theaters scattered over the United States, which are, roughly, arranged in two circuits—an Eastern circuit, comprising those owned by one set of the defendants, and with other theaters known as the "Keith circuit," and a Western circuit, comprising those owned by other defendants, and with other theaters known as the "Orpheum circuit." The owners of the other theaters making up these two circuits are not parties to the action. The entertainments in these theaters are each made up of short, disconnected acts, aggregating altogether two or three hours. The performers play at a given [167] place not over one week at a time, and the practice is for them to be booked under one contract upon the whole or part of one circuit, making contracts which require them to pass from theater to theater and from State to State, taking with them certain paraphernalia and stage

Statement of the Case.

properties. The two corporate defendants are severally booking agents for the two circuits, securing performers to travel upon the whole or part of each circuit and in general acting as agents for the managers or owners.

Up to the time of the acts here in question the plaintiff maintained offices in London, Paris, Berlin, and New York, from which it observed and sought out all promising vaudeville performers, and advised the defendants when it knew of them, thus establishing a kind of clearing house of information between performers and managers. If opportunity offered, it induced performers to come to this country from other countries, and acted as their agent in procuring for them contracts to perform on one or both of the circuits through the whole or a part of the theaters comprised in it. It arranged for the performer's entrance into the country, passing through the customs his paraphernalia, apparatus, etc., and it advised and helped him to carry them about with him. In general, the plaintiff acted as agent for the performers and as their personal representative in negotiations and contracts with the managers of the theaters, acting through the corporate defendants.

All the defendants entered into a combination or conspiracy in restraint of their own business, to be accomplished as follows: The Eastern owners were not to employ any one not booked through the Eastern booking corporation, which was not to act for any theater which employed another booking agent. They were to procure the assent of the other theaters in the Keith circuit to this plan. They agreed to employ no performer who played outside of the two circuits, and would blacklist any such and post him with the other theaters; the Eastern booking corporation refusing to act for any theater that disregarded the blacklist. No one should be employed who had as a representative any person who had obtained employment for a performer outside of the two circuits, and if any theater employed a performer who had such a representative the Eastern booking corporation should not act for that theater. All such representatives of performers should be blacklisted, and might not thereafter negotiate with the Eastern booking corpora-

tion, which would not act as agent for any theater who billed a performer represented by a blacklisted agent. Any theater billing a blacklisted performer should be blacklisted, and the Eastern booking corporation would no longer act for it. The Western booking corporation should be advised of these blacklists.

Similar allegations were made relating to the Western circuit. The defendants, in pursuance of this plan, did blacklist the plaintiff, and caused notices to be sent out to that effect, and so entirely destroyed the plaintiff's business.

Henry A. Wise, of New York City, for plaintiff.

George W. Wickersham, of New York City, for defendants.

LEARNED HAND, district judge.

[1] The combination or conspiracy is alleged to be in restraint of the defendants' business, and the first inquiry must be of the nature of the business. Undeniably certain aspects of the business are interstate commerce, as, for instance, the contracts made by the booking companies under which the performers must go from State to State, throughout the circuit, acting here and there, and fulfilling their contracts as much by the travel as by the acting. Since *Hoke* v. *United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, and *Wilson* v. *United States*, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728, it can not be doubted that this feature of the business was within the complete powers of Congress, for such purposes as it might find to the public interest. This, moreover, applies as well to that feature, incidental to the foregoing, which consists in the carriage of the [168] performers' stage properties and paraphernalia from one State to another, a necessary part of the performance of their contracts with the defendants. *The Lottery cases*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. The same may be said of the scenery and advertising matter sent from State to State by the theaters themselves. In respect of all these details the business therefore consists of interstate commerce.

Opinion of the Court.

[2] The nature of the defendants' business is one thing, determinative in cases where the question arises of a State license tax or the like; the subject-matter of their combination is, at least formally, different. Perhaps the distinction has small practical consequences here, yet it is important in such shifty questions to keep the principles in mind. No doubt the proposition still stands good that the restraint of interstate commerce must be direct (*United States* v. *Patten*, 226 U. S. 543, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. [N. S.] 325), just as it did when *E. C. Knight* v. *United States*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, was decided; but nobody can intelligently read the decisions without becoming aware that the actual meaning of the words has greatly changed. All the cases, of course, presuppose that the contract has an effect upon the transit of some goods or persons across State lines, but just what that effect must be is the point of divergence. From some expressions of the earlier cases it might be supposed that the agreement must in its terms concern the transit, or in other words that the conscious purpose of the parties must be to change movement, which would otherwise occur; but that rule is not now the law. Since perhaps *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and certainly since *United States* v. *Patten*, *supra*, a case which had an unusual degree of consideration by the Supreme Court, it must be understood that the combination must be judged by the usual rule of legal responsibility; that is to say, whether the effect upon the movement of goods or persons is within those consequences which would reasonably be supposed to result from the parties' acts.

The words "direct" and "indirect" permit of some latitude, as the cases show. In nature all results are equally inevitable, and the category has no useful application; it would be arbitrary and meaningless. Only when we speak of conscious persons, necessarily ignorant of all the causes which actually operate, can the distinction become useful; and it is, of course, only in relation to persons that it is used juristically. As I have said, the rule no longer is that

only those results are direct which fall within the immediate purpose, or high light of intention, a rule which would eliminate consequences, certain enough to follow, but neither desired nor intended. When once that test is abandoned, there remains only the common test of legal responsibility, which I have mentioned, or else the test of more or less. It may be that some effects of a combination, certain enough to follow, bear so small a proportion to the sum total that the Sherman Act will not reach the combination as a whole. Although the statute may seem intended to exercise the Federal power to its fullest capacity, and although Congress no doubt might make illegal any combination which to the parties' knowledge affected interstate commerce in any degree what[169]ever, the decisions of the Supreme Court certainly prove that it has not been so interpreted, and that results insignificant in proportion to the total effect will be disregarded. This, in any case, is the present meaning of the test of "direct" and "indirect" as I understand it in the development of the decisions.

[3] If this be so, then the case depends upon whether the effect upon interstate commerce of a monopoly of the defendants' business is so inconsiderable as not to come within the statute. In the light of the allegations, I do not think that it is such. It may well be that the results of a monoply of the playhouses within a single State would not come within the statute, though it were shown inevitably to affect the entrance or exit from the State of performers and their accouterments, and though that result were obvious to the parties concerned from the outset. Here there is no such case, because here the contracts of hiring involve for their performances the transit quite as much as the performance. I can not say that this feature is so inconsiderable a part of the business that it must be disregarded; I must say that it is within the necessary consequences of their acts.

[4, 5] The cases do not seem to me to give a solution for a new situation, for each stands upon its own facts. The insurance cases, ending in *New York Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332, perhaps stand somewhat apart; in any event, they be-

came fixed at an early period and have been continuously reasserted without opportunity for variation. Moreover, the incidental effect upon interstate commerce bears but a small proportion to the business as a whole. They are significant, also, as arising under the legality of a State tax. In this respect they are like *Williams* v. *Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186; *Ware* v. *Mobile County*, 209 U. S. 405, 28 Sup. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031; and *U. S. Fidelity Company* v. *Kentucky*, 231 U. S. 394, 34 Sup. Ct. 122, 58 L. Ed. 283. In such cases it is, of course, apparent that, if a State is to have the power to tax at all, all businesses may not be excluded which in any way have an effect upon interstate commerce, even though Congress might regulate them to the extent that they did. If the rule in *Gibbons* v. *Ogden*, 9 Wheat. 4, 6 L. Ed. 23, that the spheres of regulation are mutually exclusive, be so rigidly applied as this, the system will not work. There are indications enough that there is now thought to be a range of governmental activity which the States may enjoy until Congress intervenes. The *Minnesota Rate cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511.

I cannot, therefore, regard those cases as necessarily determinative, in which the question only was of the power of the State to tax a local business, nor does it follow from them that a combination monopolizing the same business is necessarily outside of the Sherman Act. Of course, persons not engaged in interstate commerce may violate the Sherman Act. *Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. But I mean more than this, for in the case at bar the combination relates to the business as a whole and not to the interstate features of it. It does not follow, because the combination is within the act, that the business may not be subject to [170] a State tax. How far the effects upon interstate commerce of the combination must preponderate to bring it within this statute is not a question of the extent of Federal powers, but of the extent to which Congress intended to exert such powers. That it intended to reach every conceivable restraint of such commerce may not be true, and the degree to which it reaches is not measured

by the power of the States in the regulation of their internal affairs until Congress intervenes. It is no objection that the combination declared illegal shall be concerned in great part with internal matters.

[6] Nor need we be concerned with the question whether the acts in pursuance of the combination which injure the plaintiff are themselves a part of interstate commerce, for the illegality arises from the project or plan as a whole (*Swift* v. *United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Nash* v. *United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232), and the performance, innocent without it, takes its color from its setting.

The case of *Metropolitan Opera House* v. *Hammerstein*, 162 App. Div. 691, 147 N. Y. Supp. 532, decided by the Appelate Division of the Supreme Court, is not necessarily an authority to the contrary. There the plaintiff was in the habit of presenting opera in several States, and sent its performers, scenerymen, and stage properties about as occasion required. It also imported artists from Europe to perform in New York and elsewhere. These elements of its business were certainly interstate, and within the express control of Congress, and the questions turned, as here, whether a monopolization of the business was a restraint upon interstate commerce. If the test really be the proportion of these features to the business as a whole, obviously the case is not an authority, unless the facts are the same. They differ at least in this respect: That it was not there the course of the business to book all performers under one contract, which required them to go from one State to another. Suppose the case of a traveling troupe of players, who were constantly on tour from State to State at short "stands," and who had no fixed playhouses; certainly their business would be interstate. On the other hand, a combination of local playhouses might not be in restraint of interstate commerce, though it affected the interstate movement of actors or scenery. The defendant's business is not so wholly interstate as though they managed a troupe of traveling players, because they own theaters; but it consists none the less in universally securing from the outset that substantially each

Opinion of the Court.

player shall in fact travel upon interstate tour. I think it fair, fully recognizing the loose character of the distinction, to call the interstate element in the case at bar "essential," and that in *Metropolitan Opera Co.* v. *Hammerstein* "incidental." The rule is not so much a constitutive principle as a regulative guide.

[7, 8] There remains the final question as to whether the combination is in restraint of trade. The allegations show that the purpose of the defendants was to exclude from the two circuits any performer who would not deal exclusively with them, any theater which employed any other booking agent or performer, and any performer's agent who dealt with outsiders. Not every contract which destroys a com-[171]petition, theretofore existing, is within the act; but those are which put a market into one hand. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 843, Ann. Cas. 1912D, 734. It is the effort to secure control over prices by a control over supply which counts. No doubt "market" is a vague word; a combination may control within such narrow limits that new supplies are available at trivial advances; perhaps such combinations do not "prejudice the public interests." *Nash* v. *United States*, 229 U. S. 373, 376, 33 Sup. Ct. 780, 57 L. Ed. 1232. If the combination does not control enough of the supply to fix prices at all, it cannot be an unreasonable restraint of trade prejudicial to the public. In the case at bar the allegations show that the defendants are trying to keep all "first-class" performers for their own theaters, refusing to allow them to act, if they act elsewhere, refusing to allow other theaters to have the circuits' performers if they take others, refusing to deal with any performers' agents who book them elsewhere. Article XIX of the complaint alleges that "first-class" performers cannot obtain sufficient employment in the United States and Canada outside the two circuits to make a living. The necessary inference is that the defendants, if successful, will control all "first-class" performers and succeed in monopolizing the supply. This, in turn, enables them to control the whole business, and constitutes the very conditions which the Sherman Act means to